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CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1981

WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CITATIONS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on April 15, 1982, rehearing denied June 22, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 47,052, is reported as Harvard v. State, 414 So.2d 1032 (Fla. 1982) and is set out at pages 5a-10a in the Appendix hereto. Petitioner's conviction had previously been affirmed and the sentence vacated in a decision reported as Harvard v. State, 375 So.2d 833 (Fla. 1978) which is set out at pages 1a-4a of the Appendix hereto. Petitioner sought certiorari in this Court regarding the judgment upholding the conviction only and this Court denied certiorari in Harvard v. Florida, 441 U.S. 956 (1979).

JURISDICTION

The judgment of the Supreme Court of Florida was filed on April 15, 1982, and petitioner's timely motion for rehearing was denied by order dated June 22, 1982. (The order denying rehearing is set out at page 11a of the Appendix). On August 10, 1982 Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including September 21, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the

Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. What is the proper disposition where there has been a direct violation of Gardner v. Florida, 430 U.S. 349 (1977) by the consideration of secret information in imposing the death sentence; is the procedure applied in the present case involving a post-sentence, post-appeal proceeding where the scope of evidence petitioner was allowed to present was strictly limited and where the prior Gardner-violative death sentence was presumed correct with the burden on petitioner to prove harmful error, consistent with the decision in Gardner and with the Eighth and Fourteenth Amendments?

2. Whether by affirming the application of the aggravating factor of "heinous, atrocious or cruel" solely on the basis of the undefined terms of "stalking" and "harassment", the Florida Supreme Court has placed such a broad and vague construction on the §921.141 (5)(h) aggravating factor so as to violate the Eighth and Fourteenth Amendments and whether the intervening decision in Godfrey v. Georgia, 446 U.S. 420 (1980) must be given retroactive effect in such circumstances and where the jury was provided with no definition of the §(5)(h) aggravating factor?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This cause also involves Section 921.141, Florida Statutes (1973) entitled: "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length the statute is set out in its entirety at pages 12a-13a of the Appendix hereto.

STATEMENT OF THE CASE

Petitioner was indicted in 1974 for first degree murder of his ex-wife, Ann Bovard. He was convicted as charged after trial by jury and in the separate sentencing trial the jury returned, by an 8 to 4 vote, a recommendation of the imposition

of the death sentence. The judge sentenced petitioner to death and petitioner appealed to the Supreme Court of Florida. The Supreme Court of Florida affirmed petitioner's conviction and death sentence (1a-3a); Harvard v. State, 375 So.2d 833 (Fla. 1978). While the case was pending on rehearing, the Florida Supreme Court issued an order pursuant to Gardner v. Florida, 430 U.S. 349 (1977), requiring the trial judge to state whether he had considered any information not disclosed to petitioner in imposing the death sentence. The trial judge responded that he had considered certain confidential information in the sentencing. Petitioner then filed, in the Florida Supreme Court, an application for relief pursuant to Gardner. The Supreme Court of Florida issued an order denying rehearing and vacating and remanding the death sentence for the violation of Gardner (3a); 375 So.2d at 835.

Thereupon, further proceedings were conducted in the sentencing court. Petitioner filed a motion for substitution of judge, a motion for convening of an advisory jury, and a motion for statement of aggravating circumstances which were each denied. A hearing was then held in the sentencing court on February 9, 1979. The state presented no testimony or evidence. Petitioner presented the testimony of Charles Hess, petitioner's attorney for a prior 1969 Jacksonville offense, and petitioner testified. Petitioner also introduced into evidence a prior psychiatric report and proffered the preliminary hearing transcript from the prior Jacksonville offense. Petitioner proffered the testimony of Mr. Hess regarding the factors the Jacksonville judge had before him in sentencing petitioner on that prior offense, regarding the psychiatric report done in Jacksonville relative to the prior offense, and regarding inconsistences in the facts relating to that prior offense. Petitioner also testified regarding that prior offense and regarding the present offense.

The sentencing judge ruled that most of the evidence regarding the prior Jacksonville offense that petitioner had proffered was beyond the scope of the remand by the Florida Supreme Court and thus refused to consider it. Finding that

the previous death sentence was appropriate, the judge reimposed the death penalty on August 22, 1979, without issuing findings of fact in support of that sentence. In March, 1980 the trial judge issued "proposed" findings of fact, requesting that the prosecutor comment as to whether the aggravating and mitigating circumstances contained in that proposed order would "pass appellate review." The prosecutor responded concerning three of the four aggravating factors found in the order. The judge adopted the suggested changes and this time finding two aggravating factors, filed his final judgment on resentencing in May, 1980.

An appeal was taken by petitioner to the Supreme Court of Florida which affirmed the proceedings conducted in the trial court and the reimposition of the death sentence.

REASONS FOR GRANTING THE WRIT

1. The inadequacy of the Florida procedure to remedy a violation of Gardner v. Florida, 430 U.S. 349 (1977). This case presents the question of the constitutional adequacy of the procedure employed by the Florida courts where there has occurred a direct violation of Gardner v. Florida, 430 U.S. 349 (1977). It is a question that was not specifically resolved by this Court in Gardner but one which is of significant importance and in need of resolution.

This case presents the proper case for resolution of the question. The record in the instant case pellucidly highlights the defects in the Florida Gardner procedure and the issue was fully preserved, developed, and addressed in the lower courts. The case-at-bar gives the lie to the constitutional sufficiency of the corrective procedure employed by the Supreme Court of Florida.

The constitutional question is important and in need of resolution because it was left open by this Court and because the procedure adopted by the Florida courts is inconsistent with the opinion in Gardner. And, although not controlling on the question, it is not of minor significance in evaluating the Florida Gardner procedure, to note that under that procedure, only Mr. Gardner's sentence was changed while all other Gardner-violative death sentences have been reaffirmed.

In Gardner v. Florida, supra, the precise relief to be granted was left open by this Court, except that the death sentence had to be vacated and that any further proceedings would have to take place at the trial level. 430 U.S. at 362. It was ordered that there be "further proceedings at the trial court level not inconsistent with this opinion." Id. The issue here is whether the Supreme Court of Florida complied with the mandate of this Court.

There are two major constitutional defects in the Gardner procedure employed in the case-at-bar. First, the original, Gardner-violative, death sentence is presumed to be

correct in the resentencing proceedings, with the result that the burden is placed upon the capital defendant to prove the prior sentence was wrong and should be changed. Second, the scope of allowable information that may be presented at the further proceedings is exceedingly narrow, with the result that the Eighth and Fourteenth Amendments mandate of individualized sentencing and reliability in capital sentencing was thwarted.

In the direct appeal of this cause, the Supreme Court of Florida, with two justices dissenting, affirmed petitioner's death sentence (1a-3a). Then, while the case was pending on rehearing,[1/] it was discovered that the sentencing judge had relied upon a confidential presentence investigation report not disclosed to counsel or petitioner, in direct violation of Gardner v. Florida, supra. (3a).[2/] Petitioner then filed for relief pursuant to Gardner, requesting that the Supreme Court of Florida "vacate the sentence, and remand this cause for a new sentencing trial." In response the Supreme Court of Florida issued its order, denying rehearing, but vacating the sentence of death for the Gardner violation (3a). The court sent the cause back to the sentencing judge for what on its face appeared to be broad relief, but which in application turned out to be severly restricted, as follows:

> The case is remanded to the trial court for resentencing without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military

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[1/] In his rehearing petition in the Supreme Court of Florida, petitioner had pointed out the possibility of a violation of Gardner: "There is some indication in the record that the judge considered matters not provided to the jury or defense counsel.... Therefore this Court should order a new sentencing hearing at which the jury may view all relevant factors."

[2/] The secret consideration was disclosed as a result of the procedure adopted by the Florida Supreme Court after Gardner, to identify Gardner violations. After Gardner, the Court issued orders to trial courts in all pending capital appeals to disclose whether they had considered confidential information in sentencing. The trial judge in the present case disclosed that he had considered secret information in sentencing petitioner. The procedure adopted by the Florida Supreme Court for identifying Gardner violations is not in question in this case, rather the question involves the procedure after the violation has been identified.

> history, as well as other matters properly considered by the trial court concerning appellant's sentence under Section 921.141, Florida Statutes (1977).

(3a).

Although the court said that it was remanding for "resentencing", in actuality the cause was remanded with the prior Gardner-violative sentence presumed to be correct and with the scope of information that petitioner could present being severely limited.

a. Restricted scope

After the remand by the Supreme Court a hearing was conducted in the sentencing court. Petitioner had previously filed and had denied several motions relating to the adequacy of the Gardner relief--motions for a different sentencing judge[3/] and for a sentencing jury.[4/] Petitioner's primary concern at the hearing was to present mitigating or ameliorative evidence relating to a prior Jacksonville offense, and hence responding to the characterizations and opinions regarding that offense contained in the undisclosed secret presentence investigation report (PSI). This prior Jacksonville offense, involing an assault on petitioner's first wife and her sister, was critically important as it is the primary reason that the death sentence was imposed and upheld in the present case. That this prior offense was the single most dominant factor leading to the death sentence in this case is shown by the fact that petitioner's death sentence is the only case where a death sentence has been upheld in Florida in a "domestic" situation.[5/] It also was the dominant theme of the Florida

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[3/] The request for a different sentencing judge was based upon the ground that the judge had already considered and relied upon the offending secret information and thus could not fairly reevaluate the evidence in resentencing, relying in part upon Santobello v. New York, 404 U.S. 257 (1971) and like cases.

[4/] The jury was requested on the grounds that serious and fundamenta error had been committed in the consideration of evidence presented in the prior sentencing trial and thus the jury's verdict, necessary for a death sentence under Florida law, could not be relied upon in the new sentencing proceeding. Thus, a full presentation of evidence was required.

[5/] The only three cases where the Florida Supreme Court has remanded for entry of life sentences, overruling both judge and jury, have involved killings resulting from emotional

Supreme Court's original opinion affirming the death sentence (2a-3a) and of the evidence presented by the prosecution and of the trial court's sentencing orders.

Not coincidentally was the prior Jacksonville offense the dominant theme, and the subject of much innuendo and characterization, in the secret PSI. At the hearing, petitioner sought to present evidence to more fully explain, to mitigate and ameli rate, the circumstances of the offense. Petitioner was, however, thwarted from doing so by the sentencing judge's ruling that such evidence was beyond the scope of the Gardner proceedings, reasoning that since testimony regarding the Jacksonville offense had been presented in the original sentencing trial, such testimony at the Gardner proceeding was irrelevant. The judge strictly limited the scope of the hearing, ruling that the Gardner remand was only for the purpose of rebutting information in the secret PSI and since evidence was presented on the Jacksonville offense in the prior sentencing, information regarding that offense would not be in rebuttal of the PSI but rather would be an attempt, in essence, to reopen the prior sentencing trial.

Petitioner was allowed, however, to proffer evidence and he did so.[6/] The poison in the secret PSI involved much more than had been presented in the prior sentencing trial. The poison

Footnote 5 continued:

domestic situations. Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975). In no such similar "domestic" case has the death penalty been upheld. See also Phippen v. State, 389 So.2d 991 (Fla. 1980); Chambers v. State, 339 So.2d 204 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975). Cf. Spinkellink v. Wainwright, 578 F.2d 582, 612 n. 37 (5th Cir. 1978) (where the State of Florida argued that domestic cases were not "appropriate for imposition of the death penalty.").

6/ In brief summary, petitioner sought to show that the Jacksonville offense was not deliberate nor planned, that it had begun over a reasonable and sincere concern for the welfare of his children, that it was highly emotional situation and that he was unarmed. Petitioner also sought to show through the proffered testimony of his attorney in that charge, all of the factors before the sentencing judge in that Jacksonville offense; for example: "Mr. Harvard had been in three courts in one morning [on the day of the offense]"; "He had been harrassed by his wife... she was vicious at that time"; "the Court knew of the circumstances of her running around on Mr. Harvard [and that] she was entertaining a man in her trailer"; and that "the cap of it was the eight-year-old child asked her father [petitioner]...what her mother was doing in bed wrestling with another man."

in the secret PSI was its characterizations, innuendo, unsupported facts,insinuations,and its use of that prior offense to form opinions and recommendations regarding petitioner.[7] The judge had relied on that secret PSI in first imposing the death sentence. Petitioner sought to respond to show all of the factors surrounding that prior offense in order to ameliorate the false characterizations and the overemphasis that had been placed upon it. For example, on that prior Jacksonville offense, petitioner had been sentenced to one year probation, with three months in the county jail and such sentence was not based upon a plea bargain. Such sentence contraindicates that the offense was asdeliberate and serious to warrant the extreme, dominant weight it was given in sentencing petitioner to death. The secret PSI criticized that sentence as being "leninent" and also said that it was based on a plea bargain. As evidence at the Gardner hearing, petitioner sought to have his attorney in that prior offense testify in order to showall of the factors that the Jacksonville judge had before him in imposing that sentence. In essence petitioner sought to show that the Jacksonville offense was not as severe as it had been characterized and thus not deserving of the overwhelming emphasis that had been placed upon it.[8] Petitioner thus sought to present mitigating evidence.

The judge however, ruled the evidence to be improper.

Footnote 6 continued:

Petitioner also sought to contradict some of the testimony of the ex-wife as given in the prior sentencing trial and as relied upon and reported in the secret PSI--- such as that he had not intentionally shot his wife and thrown her to the ground and put his foot in her back and took aim. In essence, petitioner sought to show the full circumstances to ameliorate the emphasis placed on the prior offense.

[7] For example, the secret report is filled with insinuations and characterizations that are false, such as that petitioner "fully intended to kill them" in that Jacksonville incident. It further speculated that petitioner "will go to any lengths.... in order to retaliate...." The report also claims that petitioner "placed a pistol against the head of these two women and pulled the trigger." It also said that the Jacksonville judge had been "extremely lenient" and that petitioner had entered into a plea bargain for a reduced sentencing. The secret PSI not only contained this false innuendo and "facts" but thus used it to form opinions and recommendations regarding petitioner.

[8] The Florida Supreme Court recognizes a difference in the "qualit of aggravating circumstances. See Demps v. State, 395 So.2d 501, 506 (Fla. 1981).

He recognized only a very narrow scope of the proceedings under the Florida Supreme Court's Gardner remand and ruled that only such evidence as went only to rebut specific facts in the secret PSI, not previously the subject of the prior sentencing hearing, could be presented.

The judge resentenced petitioner to death after the Gardner hearing, stating that the prior sentence was still proper. Then, nine months later, he filed findings of fact in support of the death sentence in which he expressly stated that he refused, as a matter of law to consider the evidence offered by petitioner.[9/] Petitioner challenged the narrow scope of the Gardner proceedings on appeal to the Supreme Court of Florida.[10/] The Supreme Court of Florida ruled directly upon the federal question and reaffirmed the extremely narrow scope it allows in proceedings conducted after a Gardner violation. It summarized its holding as follows:

> This Court's remand for resentencing was for the purpose of redressing a Gardner violation. Under our order, the trial judge was obligated to consider the evidence offered by appellant to explain contradict, or rebut information which had been previously undisclosed to appellant or his counsel. We conclude that the trial judge went beyond what was necessary in allowing appellant a full opportunity to present evidence at the resentencing hearing in rebuttal of the confidential information previously considered; we find no error.

(emphasis supplied) (9a). The Supreme Court of Florida thus clearly iterated the limited scope it would allow in Gardner proceedings and applied that narrow limitation strictly in

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9/ In his order the judge stated:

> "[I]t appears to this Court that, while there was a summary of the 1969 shootings of a former wife and a former sister-in-law contained in the confidential portion of the presentence investigation, the Defendant's main thrust was to impeach the testimony of the former wife and former sister-in-law as given in the bifurcated sentencing phase of his trial and not the summarized information as set out in the presentence investigation. Such impeachment should have been done at the time of trial and it therefore appears that this was wrongful attempt to belatedly impeach evidence presented by the State to the advisory jury. The Supreme Court's Remand was not for this purpose."

10/ The point on appeal presented to the Florida Supreme Court by petitioner was that: "The procedure employed in resentencing appellant to death denied appellant due process of law and constituted cruel and unusual punishment.... B. The lower court improperly limited the scope of resentencing proceedings."

the present case. The Court reasoned that since the evidence petitioner sought to present to mitigate the material in the secret PSI had been the subject of evidence also at the prior sentencing trial, it could not be considered because it was not "information... previously undisclosed." The result was that petitioner was precluded from presenting and the Florida courts refused to consider, as a matter of law, the ameliorative, mitigating and explanatory evidence and arguement offered by petitioner. The Court has given no reason for its holding that Gardner proceedings are so limited in scope. Nevertheless such a limitation violates both the spirit and the letter of the Gardner holding. In Gardner it was held that a death sentence imposed in part upon secret information denied due process of law. 430 U.S. at 362. A post-sentence, post-appeal proceeding where the evidence petitioner is allowed to present is so narrowly restricted so as to preclude the type of ameliorative evidence as sought to be presented here, cannot cure the due process violation. Such a procedure clashes with the unique need for reliability required for capital sentencing and belies the requirement of an individualized sentencing determination. The evidence petitioner sought to present certainly related to the "defendant's character or record and any of the circumstances of the offense...." required by the Eighth Amendment to be considered. Lockett v. Ohio, 438 U.S. 586, 604 (1978). That this Court expected a broader scope of proceedings is shown by the refusal in Gardner to allow as relief that the Supreme Court of Florida review the secret PSI. 430 U.S. at 320. By rejecting such a review as adequate to correct the due process violation, this Court held that a proceeding restricted to review of the secret PSI would be insufficient because it would not be a resentencing with a weighing and evaluation of aggravating and mitigating factors. See also Gardner v. Florida, supra, 430 U.S. at 370 n. (Marshall, J., dissenting).

b. Presumption of correctness

Moreover, in conjunction with this exceedingly sterile and narrow scope of proceedings, the Florida courts further limited the Gardner relief procedure by application of a presumption of

correctness of the prior Gardner-violative death sentence and by placing the burden on petitioner. The result is that the Florida courts have constructed a form of relief that is in effect identical to the form of relief expressly rejected by this Court in Gardner. In practice, this presumption required that petitioner prove prejudice from the Gardner violation. Implicit in this Court's rejection as relief that the Florida Supreme Court review the secret PSI, was the holding that an analysis of prejudice or harmless error would be inadequate to correct the due process violation.

That the presumption that the Gardner-violative sentence was correct was applied in the present case is expressly shown by the record. At the conclusion of the hearing in the sentencing court after the remand, the judge reimposed the death sentence, stating that petitioner had not shown anything in the hearing to change the prior sentence: "The Court is of the opinion that the sentence as earlier imposed is still an appropriate sentence." The sentencing court issued no findings of fact or weighing of aggravating and mitigating factors at the time that the sentence was imposed -- those findings were not made until nine months later.[11/] The use of the presumption of the correctness of the prior sentence is evident. The Supreme Court of Florida's opinion on direct appeal expressly

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11/ That the sentencing judge did not weigh aggravating and mitigating factors is shown by his sentencing procedure. He imposed the sentence, saying that the prior sentence was proper. He entered no findings of fact and no analysis of aggravating and mitigating factors at that time. Not until nine months later did the judge enter findings in support of the sentence, and then the record shows that he only entered the findings in order to retrojustify an already imposed sentence so that it would "pass appellate review." Prior to issuing his findings, the judge sent out proposed findings and asked the state to advise him whether they "will pass appellate review." The state responded with suggested changes and the judge adopted the changes, altering the aggravating factors that he had found in his proposed order. The judge thus did not use the aggravating and mitigating factors to determine the appropriate sentence but rather used them in order to allow his previously imposed death sentence to "pass appellate review." Such a procedure is neither reliable nor individualized and pellucidly demonstrates the presumption of correctness he placed on the prior sentence.

recognizes and upholds the presumption of correctness of the prior sentence that was applied in the Gardner proceedings:

> "[The sentencing judge's] conclusion that the death sentencing was again appropriate clearly indicates that his finding is based upon the failure of the defense to present sufficient evidence at resentencing to rebut the information contained in the confidential portion of the presentence investigation report or in the military records. The written order expressly states that the defendant had failed to show harm or errors in the confidential matters considered in the original sentencing procedure."

(emphasis supplied) (7a).[12/]

Thus, the procedure where there has been a direct Gardner violation as applied in this case, was highly restrictive in scope and legal effect. It placed the burden on petitioner to prove harm from the Gardner violation and allowed petitioner only an extremely narrow scope of evidence in which to do so. The relief fashioned by the Florida courts in this case was a post-sentence, post-appeal proceeding where he was strictly limited to presenting evidence that went only to information in the secret PSI and where the burden was placed upon him to show harmful error in the Gardner violation.

In Gardner, this Court remanded for "proceedings at the trial court level not inconsistent with this opinion." 430 U.S. at 362. The proceedings in the present case were inconsistent with the mandate of Gardner. The Gardner-relief procedure in Florida is a sham, a "resentencing" in words only.

This Court should accept jurisdiction in this case to review the constitutional question left open in Gardner.

12/ The Florida Supreme Court has in other cases applied the restrictive scope of Gardner remand proceedings -- not allowing challenges to aggravating factors nor presentation of mitigating circumstances -- and has applied the presumption that the prior Gardner-violative was correct -- thus placing the burden on the defendant and refusing to review the propriety of previously found aggravating factors. See, e.g., Dougan v. State, 398 So.2d 439 (Fla. 1981). In dissent in Dougan, two justices opined, contrary to the majority that: "The original sentence was vacated. If execution as ordered is to take place, then that execution must be predicated on the last-imposed sentence, which must be free from infirmities. Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own." (emphasis supplied) Id. at 44)

2. The vagueness and overbreadth of the aggravating circumstance of "especially heinous, atrocious or cruel" and the retroactivity of Godfrey v. Georgia, 446 U.S. 420 (1980). The application and affirmance of the aggravating circumstance of "especially heinous, atrocious or cruel" [Fla.Stat. §921.141 (5)(h)] by the Supreme Court of Florida in the present case is violative of the need to channel sentencing discretion by "clear and objective standards." Gregg v. Georgia, 428 U.S. 153, 198 (1976).

The case-at-bar is the proper case to review this important Eighth and Fourteenth Amendment question, not only because its facts are strikingly similar to those in Godfrey v. Georgia, supra, but also because the Florida Supreme Court upheld the application of the §(5)(h) aggravating circumstance on a narrow, but nonspecific ground, that pellucidly highlights the standardless application.

The situation in the present case arises out of a bitter and emotional divorce. There had been several confrontations between the two for several months. On the night of the offense, petitioner was going into work at his cabinet shop, but on the way into the shop he met a friend/employee who was depressed and wanted to talk. They bought some beer and went to the beach where they sat in petitioner's car, drank and talked for several hours. At a bar close by, petitioner's estranged wife's car was in the parking lot.[13/] As petitioner and his friend began to leave the beach, petitioner's wife was driving away from the bar and petitioner followed her down a main thoroughfare of the town. At one point she slowed and pulled to the shoulder of the road and petitioner pulled up beside her. A shotgun was pointed through the passenger side of petitioner's car and one shot was discharged.[14/] The deceased was killed instantaneously.

[13/] The bar was erroneously noted by the Supreme Court of Florida as being the wife's place of employment.

[14/] There is some question as to whether petitioner fired the shot or whether petitioner's friend pulled on the gun causing it to discharge. His friend testified that he had thought he caused the gun to fire but that the police had convinced him otherwise though he admitted pulling on the gun at the time it discharged. Nevertheless, the Florida courts found that petitioner had fired the shot.

Such circumstances under previous Florida precedent would not constitute "especially heinous, atrocious or cruel."[15] This face was implicitly recognized by the Florida Supreme Court when it upheld the §(5)(h) aggravating factor by finding so called "additional acts." The court said:

> "... appellant's lying in wait for and stalking of Ms. Bovard, compounded by appellant's previous harassment of her, constitute sufficient 'additional acts' to justify application of the heinous, atrocious, or cruel aggravating factor."

(9a).

The Florida Supreme Court has given no definition of "stalking" or "harassment" so as to justify a finding of the §(5)(h) aggravating factor.[16] In fact, in previous cases the court had rejected such a finding under similar circumstances. For example, in Kampff v. State, 371 So.2d 1007 (Fla. 1979) the court rejected heinous, atrocious or cruel as an aggravating circumstance where the defendant went to his wife's place of employment and fired at least five shots, killing his wife. Kampff had previously given his son "a .38 caliber bullet to give to his mother and told him to tell her to 'have fun'." Id. at 1009. The trial court had found that petitioner had been brooding over his divorce and planned the murder for three years. Kampff additionally had been "harassing" his former wife since their divorce and he had asked their daughter whether she would miss her mother "if anything happened to her." Id. In Blair v. State, 406 So.2d 1103 (Fla. 1981) the defendant made elaborate plans to kill his wife and on the day of the offense he arranged for everyone else to be out of the house where he shot and killed his wife. The Supreme Court of Florida rejected especially heinous, atrocious or cruel as an aggravating factor. The situation in Halliwell v. State, 323 So.2d 557 (Fla. 1975) arose from an emotional love triangle where the defendant killed his lover's husband by crushing his skull

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15/ See, e.g., Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) ("... a murder by shooting ... is as a matter of law not heinous, atrocious or cruel."); Maggard v. State, 399 So.2d 973, 977 (Fla. 1981) (murder by a single shot gun blast is not heinous, atrocious, or cruel); Lewis v. State, 377 So.2d 640, 646 (Fla. 1980)

16/ The dictionary definitions do not aid in narrowing the meanings: "Harass" is "to annoy continually" with synomyms of "harry, plague,

with a 19-inch iron "breaker bar" and then dismembered the body. The Florida Supreme Court found "nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. Also, in Lewis v. State, 398 So.2d 432 (Fla. 1981) the court rejected the finding of 8(5)(h) where "[t]he trial court judge based his finding that the murder was heinous, atrocious, and cruel on the fact that the murder was premeditated, cold and calculated, and stealthily carried out." Id. at 438. See also Armstrong v. State, 399 So.2d 953 (Fla. 1981).[17/]

Accordingly, there is no specific and detailed guidance by the Florida Supreme Court as to "stalking" or "harassment" establishing heinous, atrocious or cruel. In the cases referred to in the above paragraph, as well as other, heinous, atrocious or cruel had been rejected under such circumstances. The result is the failure to "tailor and apply [Florida's capital sentencing] law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, supra, 446 U.S. at 428.

There is nothing in the words "stalking" and "lying in wait" that gives any guidance or implies any restraint on the capricious imposition of the death penalty. It is also important to note that those "findings" of "stalking" and "lying in wait" by the Florida Supreme Court were not findings by the sentencing judge in this sentencing. Rather those "findings" come directly from the Florida Supreme Court's prior oponion in this case (before the vacation of the sentence for a Gardner violation). On resentencing the sentencing judge had removed those findings, apparently because they were unsupported by the evidence, and thus the Florida Supreme Court's affirmance of the 8(5)(h) aggravating factor suffers

Footnote 16 continued:
pester, tease and tantalize"; and "stalk" is "to walk stiffly or haughtily" or "to approach stealthily." The Merriam-Webster Dictionary.

17/ The facts of the present case are also closely similar, although somewhat less agregious, to those faced by this Court in Godfrey v. Georgia, supra, where it was held that the "petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."

from the additional defect of being based upon findings not made by the trial court. Cf. Presnell v. Georgia, 439 U.S. 14 (1978). The "stalking" and "lying in wait" findings are in fact unsupported by the record which shows that petitioner had not planned to go to the beach to drink that night but had planned to work until meeting his friend on the way. All the record shows is that petitioner left at the same time his ex-wife left the bar (at closing) and that he was behind her, following, as they drove down a main thoroughfare. There is nothing to show that petitioner planned to shoot his wife.[18/] As to the "harassment," it appeared to be at least somewhat mutual and not unlike usual bitter emotional divorces.[19/] It remains that there is nothing in the Florida Supreme Court's opinion to define, guide, restrict or control the application of the §(5)(h) aggravating factor. Such application is fatal to the rational and consistent standards required by the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, supra, 446 U.S. at 427-428, 432-433.

An additional constitutional defect in this case is that the aggravating factor of "heinous, atorcious or cruel" was not defined in the instructions to the jury. The trial judge merely read to the jury that one of the aggravating factors was that "the capital felony was especially heinous, atrocious or cruel" without any further definition. In Godfrey v. Georgia, supra this Court disapproved of an instruction that told the jury of the Georgia equivalent of §(5)(h). The jury in Godfrey was simply told that one factor was "outrageously or wantonly vile, horrible and inhuman." As this

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18/ Nor is there any evidence or any finding that the deceased knew she would be killed -- a factor that the Supreme Court of Florida has used with some frequency to make an otherwise non-heinous gun shot death, heinous, atrocious or cruel. E.g. Combs v. State, 403 So.2d 418 (Fla. 1981); Jones v. State, 411 So.2d 165 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). See also Zeigler v. State, 402 So.2d 365 (Fla. 1981).

19/ For example, there was evidence that petitioner tried unsuccessfully to plant marijuana in her car to have her arrested, he threw firecrackers in her yard one time, she went to his girlfriend place of employment and created a confrontational scene, she confronted petitioner in his cabinet shop where they began to fight with petitioner being bitten and cut, petitioner allegedly called one time to have her phone disconnected, she harassed his girlfriend, he sent a threatening note to her, she frequently called him resulting in her roommate opining that she was provoking petitioner.

Court held in Godfrey:

> "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence."

446 U.S. at 428. It was noted that the "jury's interpretation of [the aggravating factor] can only be subject of sheer speculation." Id. at 429.

The same constitutional defect obtains in the present case and Godfrey controls to require invalidation of the factor of "heinous, atrocious or cruel."

Although the question was raised in the appeal below, the Florida Supreme Court refused to review the issue. The court held that since it affirmed the death sentence in the prior appeal of this cause, before it vacated the death sentence for a violation of Gardner, it would not reach issues going to the sentencing trial (10a). Such reasoning is contrary to the need for there to be a valid jury verdict as a prerequisite to a valid death sentence in Florida,[20] and it is contrary to the need for this death sentence to be constitutionally valid on its own. The effect of the Florida Suprme Court's ruling is to uphold the failure to instruct the jury on 8(5)(h) in this case for its reasoning was that it was affirming the death sentence because it had previously affirmed it.[21]

The Florida Supreme Court's holding ignores the intervening decision and the retroactive effect of Godfrey v. Georgia, supra. The applicability of Godfrey was briefed and presented to the Supreme Court of Florida[22] and after the

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[20] Both the sentencing judge and the Florida Supreme Court relied upon the jury's sentencing verdict in support of petitioner's death sentence. As discussed in the prior issue, the courts applied a presumption of the correctness of the prior sentence, and no jury was permitted in this sentencing proceeding in reliance upon the prior sentencing trial.

[21] Such action by the Florida Supreme Court further highlights the error in the presumption of correctness in that prior sentence that is addressed in the previous issue herein above.

[22] The decision in Godfrey was relied upon extensively in petitioner's brief in the Florida Supreme Court in petitioner's challenge to both the finding of 8(5)(h) and the failure to define it in the jury charge.

affirmance that ignored Godfrey petitioner raised the issue of the retroactivity of Godfrey in his motion for rehearing in the Supreme Court of Florida[23/] -- yet the court upheld the application of the §(5)(h) aggravating factor. The failure of the Supreme Court of Florida recognize the retroactivity of Godfrey v. Georgia, supra, was fundamentally erroneous and contrary to the decisions of this Court. In Godfrey this Court was dealing with the application of the statute that was upheld on its face in 1976 in Gregg v. Georgia, supra. Likewise, in 1976, the Florida capital sentencing statute was upheld on its face in Proffitt v. Florida, 428 U.S. 242 (1976). In Godfrey this Court applied the Eighth and Fourteenth Amendment mandate of Furman v. Georgia, 408 U.S. 238 (1972). Godfrey found the "standardless and unchannelled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury...." 446 U.S. at 429. Accordingly, because Godfrey applied previously established constitutional principles and dealt with the underlying Eighth and Fourteenth Amendment requirements for a death sentence to be constitutionally imposed, it meets the standards for retroactive application.[24/] The Florida Supreme Court thus fatally erred in ignoring and failing to give retroactive effect to Godfrey v. Georgia, supra; because under Godfrey the death sentence imposed on petitioner is constitutionally infirm and must be vacated.

Accordingly this case presents the appropriate case to review and this Court should grant certiorari to review whether the application of the §(5)(h) aggravating factor in this case constitutes such a broad and vague construction so as to violate the Eighth and Fourteenth Amendments and to decide whether Godfrey v. Georgia, supra should be given retroactive application.

23/In his motion for rehearing petitioner expressly alleged, inter alia, that: "In declining to reach the question of the lack of any definition of 'heinous, atrocious, or cruel' in the charge to the jury, this Court may have overlooked the retroactivity of the intervening decision of Godfrey v. Georgia, 446 U.S. 420 (1980).

24/See, e.g., United States v. Johnson, ___U.S.___, 73 L.Ed.2d 202 (1982).

CONCLUSION

The Petition for the Writ of Certiorari to the Supreme Court of Florida should be granted.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

82-5444

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
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CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Petitioner

INDEX TO APPENDIX

William Lanay HARVARD, Appellant,

v.

STATE of Florida, Appellee.

No. 47052.

Supreme Court of Florida.

April 7, 1977.

Rehearing Denied Nov. 2, 1978.

Certiorari Denied May 14, 1979.
See 99 S.Ct. 2185.

Defendant was convicted before the Circuit Court, Brevard County, Robert B. McGregor, J., of murder in the first degree and was sentenced to death, and he appealed. The Supreme Court held that in a capital case it is for the court to evaluate anew the aggravating and mitigating circumstances to determine whether the death sentence is appropriate and that where defendant had previously been convicted of a felony involving violence against person, which conviction resulted from his attempted murder of one former wife, and instant prosecution was based on killing of another former wife by stalking her in the dark and then in cold blood killing her with shotgun at close range, there was sufficient aggravating circumstances to warrant imposition of the death penalty but that defendant was entitled to rebut certain information relied on by the court in imposing sentence.

Conviction affirmed and remanded for resentencing.

Boyd, J., concurred in part and dissented in part with an opinion.

Hatchett, J., concurred in part and dissented in part with an opinion.

1. Criminal Law ⇐1134(1)

When the death sentence is imposed, it is the responsibility of the Supreme Court to evaluate anew the aggravating and mitigating circumstances to determine whether such punishment is appropriate; the court must also insure that punishment for murder is evenly applied so that similar homicides draw similar penalties. West's F.S.A. Const. art. 5, § 3(b)(1); West's F.S.A. § 921.141(3).

2. Homicide ⇐354

Where defendant had previously been convicted of a felony involving violence against a person, which conviction resulted from his attempted murder of a former wife, and instant case involved killing of another former wife by stalking her in the dark and then in cold blood killing her with a shotgun at close range, there were sufficient aggravating circumstances to warrant imposition of the death penalty. West's F.S.A. § 921.141(3).

On Petition for Rehearing

3. Criminal Law ⇐1188

Where in imposing death sentence the trial court considered confidential portion of presentence investigation report and information furnished as to defendant's military record but neither was furnished to counsel for the State or defendant prior to sentencing, remand for resentencing was required, although without necessity of convening an advisory jury, with defendant entitled to opportunity to explain, contradict, etc., the materiality and import of the confidential information and military history. West's F.S.A. § 921.141.

Richard L. Jorandby, Public Defender, Bruce Zeidel and Craig S. Barnard and Jerry L. Schwarz, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin and Michael H. Davidson, Asst. Attys. Gen., for appellee.

PER CURIAM.

This is an appeal from a conviction of murder in the first degree and a sentence of death. We have jurisdiction.[1]

Shortly after midnight on February 16, 1974, appellant William Lanay Harvard sat

1. Art. V, § 3(b)(1), Fla.Const.

in his car near Cocoa Beach and drank beer with a young friend, Ralph Baggett. A single-barrel, twelve-gauge shotgun lay in the back seat. Harvard had placed his car within view of the Sansqar Bar and was apparently waiting for his ex-wife Ann Bovard to leave the tavern. According to the testimony of Baggett, when Ann Bovard drove off alone in her car, appellant followed. They had driven in tandem for about eight miles when they approached the residential area in which the woman lived. Harvard ordered Baggett into the rear seat and pulled the shotgun into the front. For some reason, Ann Bovard slowed to a stop on the right shoulder of the road. With his right hand, Harvard placed the barrel of the shotgun in the open window of the passenger's door; with his left hand he steered the automobile tightly along the left side of Ann Bovard's car so that the weapon aimed directly at her throat. He yelled, "Bitch," and fired into her neck. Ann Bovard died of massive damage to the trachea, esophagus, right artery, and left jugular vein.

Harvard was indicted for murder in the first degree. At trial, the jury found him guilty as charged. In the separate sentence advisory proceeding, the jury recommended death.

The trial court ordered a presentence investigation. The trial judge, upon consideration of the report, the evidence presented at the trial and sentencing proceedings, determined that there were sufficient aggravating circumstances which outweighed the mitigating factors to justify the recommended sentence. The trial judge sentenced William Lanay Harvard to death, entering the formal judgment as required by Section 921.141(3), Florida Statutes. The judgment stated the facts on which the death sentence is based as follows:

"1. The capital felony in this case was especially heinous and atrocious in that the defendant had previously been married to the victim and a divorce had occurred and thereafter the defendant harassed and terrorized the victim by threatening her with harm and death without any provocation on the part of the victim. The accused premeditated and plotted her death and included in his plans provision for an alibi for himself; the defendant stalked the victim and pulled up beside her on a public street pointing a twelve gauge shotgun and discharging it at close range directly into the neck of the victim.

"2. The defendant has previously been married to another woman and on one occasion had assaulted that wife with a firearm knocking her to the ground and discharging a pistol into her head while standing over her; that first wife did not die, the defendant was convicted of Aggravated Assault.

"3. The defendant testified in the separate sentencing proceeding, and his attitude, appearance and demeanor was that of a person cold, calculating and without remorse."

Appellant urges reversal of his conviction of first degree murder on three grounds. First, he contends that there was insufficient evidence to support a finding of premeditation; second, he contends that it was reversible error for the trial court to refuse to instruct the jury on aggravated assault as a lesser included offense; and third, he contends that it was reversible error for the state to make certain remarks during the closing arguments. We have searched appellant's arguments for merit, but have found none. The conviction is affirmed.

[1] When the sentence of death has been imposed, it is this Court's responsibility to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate. *State v. Dixon*, 283 So.2d 1 (Fla. 1973). We must also ensure that punishment for murder is evenly applied so that similar homicides will draw similar penalties.

[2] The aggravating circumstances include the following. Appellant has previously been convicted of a felony involving violence against a person. That conviction resulted from appellant's attempted murder of another former wife. In that prior inci-

dent, the appellant forcibly entered the woman's home and, in front of the children, threw her to the floor, placed his right foot on her back, and fired a twenty-two pistol into her head. Miraculously, she lived.

In the instant case, appellant again demonstrated his propensity toward calculated homicide in the killing of Ann Bovard. The murder was the final, deliberate stroke in appellant's campaign of terror against his ex-wife. He sought her out in the early morning hours, stalked her in the dark, and then in cold blood killed her with a shotgun at close range.

The record discloses no mitigating factors recognized by the statute. The total circumstances established the murder as a cold-blooded execution. The jury and the judge both found the aggravating circumstances sufficient to warrant death. We agree.

The conviction and sentence are affirmed.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and ROBERTS (Retired), JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion.

HATCHETT, J., concurs in part and dissents in part with an opinion.

BOYD, Justice, concurring in part and dissenting in part.

I concur in affirmance of the conviction of the appellant, but dissent to imposition of the death penalty.

The law requires that similar punishment be given for similar crimes. Just as four members of the jury who voted against an advisory sentence of death, I feel application of the death penalty is inappropriate after weighing the aggravating and mitigating circumstances as required under Section 921.141, Florida Statutes. I would direct the trial court to enter a sentence of life imprisonment without consideration of parole for a minimum of twenty-five years.

HATCHETT, Justice, concurring in part and dissenting in part.

I join in affirmance of the conviction but dissent as to the imposition of the death penalty.

ORDER

Pursuant to the dictates of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court directed the trial judge who imposed the death sentence in this case to advise the Court whether he imposed the death sentence in consideration of any information not known to appellant. His response states that he considered a confidential portion of the pre-sentence investigation report, and information furnished by the United States Marine Corps as to the defendant's military record, attached to the confidential evaluation, and that neither was furnished to counsel for the state or the defendant prior to sentencing.

Before the trial judge responded to our *Gardner* order, counsel for appellant filed a petition for rehearing, alleging various matters relating to appellant's conviction and sentence, and application for *Gardner* relief. The state has filed a response to the petition for rehearing.

[3] On consideration of appellant's petition and the trial court's response to our *Gardner* order, and pursuant to the decision of the United States Supreme Court in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), rehearing is denied but the sentence of death in this cause is vacated. The case is remanded to the trial court for resentencing, without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military history, as well as other matters properly considered by the trial court concerning appellant's sentence under Section 921.141, Florida Statutes (1977).

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

William Lanay HARVARD, Appellant,

v.

STATE of Florida, Appellee.

No. 47052.

Supreme Court of Florida.

April 15, 1982.

Following remand for resentencing, 375 So.2d 833, the Circuit Court, Brevard County, Robert B. McGregor, J., reimposed the death sentence, and defendant appealed. The Supreme Court held that: (1) nine-month delay between announcement of sentence at conclusion of *Gardner* rehearing and issuance of written final judgment was not reversible error; (2) resentencing hearing was not required to be had before a new judge; (3) trial judge went beyond what was necessary in allowing defendant to present evidence in rebuttal of confidential information previously considered; and (4) defendant's lying in wait for and stalking former wife, compounded by prior harassment of her, constituted sufficient additional acts to justify application of the heinous, atrocious or cruel aggravating factor.

Affirmed.

Boyd, J., filed dissenting opinion.

1. Criminal Law ⇐996(3)

Nine-month delay between announcement of reimposition of death sentence at conclusion of *Gardner*-mandated resentencing and issuance of written final judgment did not demonstrate that the trial judge failed to properly weigh aggravating and mitigating factors and although there was no reversible error in manner in which the trial judge rendered his decision, announcement of the decision and filing of written findings should be done simultaneously. West's F.S.A. § 921.141.

2. Criminal Law ⇐996(3)

Gardner-mandated capital resentencing hearing was not required to be held before

a different judge as against contention that because original trial judge considered confidential matters in imposing the death sentence he could have been influenced thereby on resentencing. West's F.S.A. § 921.141.

3. Constitutional Law ⇐270(2)
Criminal Law ⇐996(3)

At *Gardner* mandated capital resentencing, i.e., resentencing required because the trial judge considered information which defendant had no opportunity to deny or explain, the trial judge did not erroneously limit presentation of evidence concerning events underlying an aggravated assault conviction which was used as a statutory aggravating circumstance in initial sentencing and defendant was not denied due process because of refusal to admit some portions of testimony offered by his former attorney relative to the assault conviction. West's F.S.A. § 921.141(5)(b); U.S.C.A.Const.Amend. 14.

4. Homicide ⇐354

Although former wife's death was almost instantaneous due to gunshot wound, defendant's lying in wait for and stalking his former wife, compounded by his previous harassment of her, constituted sufficient "additional acts" to justify application of the heinous, atrocious or cruel aggravating factor necessary for the death sentence. West's F.S.A. § 921.141(5)(h).

See publication Words and Phrases for other judicial constructions and definitions.

5. Homicide ⇐354

Aggravated assault conviction based on incident of violence to defendant's first wife's sister was a proper aggravating circumstance in imposing death sentence for fatal shooting of second ex-wife. West's F.S.A. § 921.141(5)(b).

6. Criminal Law ⇐996(3)

Matters which could have been raised on appeal resulting in affirmance of conviction could not be raised in subsequent proceedings on *Gardner* remand, i.e., remand for capital resentencing because the court had initially considered confidential information that was not revealed to the defendant. West's F.S.A. § 921.141.

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Chief Asst. Public Defender and Richard B. Greene, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for appellant.

Jim Smith, Atty. Gen. and James Dickson Crock, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is an appeal from a death sentence which was reimposed upon appellant after a resentencing hearing pursuant to an order of this Court contained in *Harvard v. State*, 375 So.2d 833, 835 (Fla.1978) (on rehearing). We have jurisdiction under article V, section 3(b)(1), Florida Constitution. We affirm.

To properly address the issues, it is necessary to establish chronologically the events culminating in this proceeding. Appellant was convicted in 1974 of first-degree murder for the shooting death of his second ex-wife, Ann Bovard. The facts of this murder, described in more detail in our original opinion, reflect that appellant waited in his automobile for Ms. Bovard to leave her place of employment, then followed her for some distance, pulled alongside her car, and discharged a shotgun blast into her neck, killing her instantly. The jury recommended the death penalty and the trial judge agreed, imposing the death sentence after concluding that no mitigating circumstances existed to outweigh the applicable aggravating circumstances.

While this case was pending on appeal before this Court, the United States Supreme Court, in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), decided that it is a denial of due process for the death sentence to be imposed if the trial judge, in weighing the aggravating and mitigating circumstances of the case, considers confidential information which the defendant had no opportunity to deny or explain. As a result of this U.S. Supreme Court decision, this Court di-

rected all trial judges in the state to advise the Court whether they had imposed the death sentence in consideration of any information not known to the defendants. The trial judge in the instant case responded that he had, in fact, considered a confidential portion of the presentence investigation report and information regarding appellant's military record, furnished by the United States Marine Corps, which had not been made available to appellant or his counsel.

We affirmed the conviction of appellant, but, to comply with the *Gardner* decision, we vacated the death sentence and remanded the case for resentencing, stating that the hearing would be

> without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military history, as well as other matters properly considered by the trial court concerning appellant's sentence. . . .

Harvard, 375 So.2d at 835. The trial judge proceeded in accordance with this direction and, at the conclusion of the resentencing proceeding, reimposed the death sentence. In this appeal, appellant argues that the *Gardner* remand resentencing procedure denied him due process of law.

[1] Appellant first attacks the procedures used by the trial judge in reimposing the death sentence, arguing that the nine-month delay between the announcement of the sentence at the conclusion of the hearing and the issuance of the written final judgment of resentencing demonstrates that the trial judge failed to properly weigh the aggravating and mitigating factors. We find no reversible error in the manner in which the trial judge rendered his decision, although we suggest that the announcement of the judge's decision and the filing of written findings should be done simultaneously. The judge reimposed the death sentence after considering all of the information available to him, including the evidence presented at resentencing. His conclusion that the death sentence was again appropriate clearly indicates that his finding is based upon the failure of the defense to present sufficient evidence at resentencing to rebut the information contained in the confidential portion of the presentence investigation report or in the military records. The written order expressly states that the defendant had failed to show harm or errors in the confidential matters considered in the original sentencing procedure. The evidence in this record not only confirms that finding, but it also reflects that the confidential information was primarily cumulative in light of the evidence actually presented at the original sentencing hearing. We find no error.

[2] The second error alleged by appellant is the trial judge's refusal to assign the resentencing hearing to a new judge. Appellant argues that because the original trial judge considered confidential material in imposing the first death sentence, he could have been influenced at resentencing by this improper information and by his prior ruling. We reject this argument. This case was remanded to comply with the rule announced in *Gardner*, and nothing in *Gardner* requires the assignment of a new judge to conduct the resentencing procedures. Furthermore, trial judges are routinely made aware of information which may not be properly considered in determining a cause. Our judicial system is dependent upon the ability of trial judges to disregard improper information and to adhere to the requirements of the law in deciding a case or in imposing a sentence. *Alford v. State*, 356 So.2d 108 (Fla.1977). The written judgment of resentencing in this case is detailed, logical, and fully supported by the record.

[3] Appellant next claims that, at resentencing, the trial judge erroneously placed limitations on his presentation of evidence concerning the events which resulted in his 1969 conviction of a felony involving violence to his first wife's sister. This conviction constitutes a statutory aggravating circumstance under section 921.141(5)(b), Florida Statutes (1979). At the original sen-

tencing hearing in 1974, the state presented evidence of the aggravated assault conviction, consisting of the testimony of the victims in the incident, Betty Ann Phillips (Harvard's first wife) and her sister, Mary Jane Sweat. Ms. Phillips described the attack in her 1974 testimony:

A Well, we arrived at the house and we walked in and I had noticed the kids' suitcase sitting in the hall and knew something was wrong and we both just looked at each other. About that time Mr. Harvard stepped out of the side closet and he had a small pistol in his hand and he looked at me and said, "I told you the next time you took me back to court I would kill you" and Mary—

Q Is that your sister?

A They started talking about his mother and I had talked to Mr. Harvard, too, about if I wanted us to go back together he would. Just by talking to him, I knew what he was there for, and they kept on, Mary, arguing about his mother, that he told her that she had called him and told her things that weren't true and Mary said she called his mother and told her about how he was acting. And that was all that she had said to his mother. And, about that time, Mr. Harvard moved his hand up and shot her right in the face and I had screamed and Mary took off for the front door and he shot her again, going out the door. And then I ran out the back door and, about that time, I was standing there beside the carport where I was and he pushed me down to the ground and I remember his foot going on my back and that is all I remember.

Q Were you shot?

A Yes, sir.

Q Where?

A On the top of the head.

This testimony is reflected in the original sentencing order and in the first opinion of this Court, although neither the state nor the appellant brought to the attention of the trial court or of this Court in the original appeal the fact that the offense to which appellant pleaded guilty was the assault against his sister-in-law rather than an assault against his first wife. The trial judge corrected that error in his findings on resentencing. In the 1974 hearing, appellant testified in his own behalf regarding the incident, characterizing the shootings as accidental. The confidential presentence investigation report also included a summary of the events surrounding the Jacksonville incident which is consistent with the testimony at the original sentencing hearing.

Appellant complains that he was denied due process in the second sentencing hearing because the trial judge refused to admit some portions of the testimony offered by appellant's former attorney relative to the 1969 proceeding. The record shows that the trial judge liberally allowed appellant to present considerable testimony and evidence concerning the assault charge. Appellant testified in his own behalf, was allowed to present the testimony of his former lawyer, and was also allowed to introduce an unauthenticated transcript of the 1969 preliminary hearing. In his testimony, appellant again principally disagreed with the characterization placed on these 1969 shootings by both victims' testimony and in the summary contained in the presentence investigation report. He admitted he shot his first wife and her sister, but excused his actions in part because of what he perceived as the misconduct of these women.

To a limited extent, the trial judge allowed appellant's 1969 attorney to testify concerning his recollection of the inconsistencies in the testimony presented by the first wife at the preliminary hearing in 1969 as compared to her testimony at the sentencing hearing in 1974. In his resentencing order, the trial judge directly addressed this asserted impeachment of the first wife's testimony in the 1974 sentencing proceeding, stating:

> Such impeachment should have been done at the time of trial and it therefore appears that this was a wrongful attempt to

belatedly impeach evidence presented by the State to the advisory jury. The Supreme Court's Remand was not for this purpose. As to the testimony contained in transcript of the proceedings of the probable cause hearing before the Justice of the Peace in Jacksonville in 1969, (more than five years earlier than the testimony of the former wife and the former sister-in-law during the bifurcated sentencing phase), this Court finds it to be substantially (and remarkably so for the passage of time involved) consistent and uncontradicting.

This Court's remand for resentencing was for the purpose of redressing a *Gardner* violation. Under our order, the trial judge was obligated to consider the evidence offered by appellant to explain, contradict, or rebut information which had been previously undisclosed to appellant or his counsel. We conclude that the trial judge went beyond what was necessary in allowing appellant a full opportunity to present evidence at the resentencing hearing in rebuttal of the confidential information previously considered; we find no error.

In his final assertion of error, appellant argues that the aggravating factors of heinous, atrocious, and cruel and of a previous conviction of a violent felony were improperly applied and that the trial judge failed to adequately consider mitigating circumstances. The conclusion that this murder was heinous, atrocious, and cruel was based upon the following analysis in the resentencing order:

> While the defendant and Ann Bovard had been divorced approximately two months, they had been separated for several months, and during the separation the defendant had engaged in a series of harassing actions. In addition, the defendant enclosed in a Christmas card he sent to Ann Bovard in December, 1973, a note saying, "You will never see Christmas." In January, 1974, after the divorce, the defendant told a coworker that he would "do anything to get her out of his hair." On the night of the killing, February 16, 1974, the defendant waited outside of his second former wife's place of employment, and when she left he followed her for approximately ten miles to the entrance of the subdivision in which Ann Bovard lived, where he pulled up close beside her apparently momentarily stopped vehicle and with a 12-gauge shotgun shot her in the neck with a shot shell loaded with pellets. The blast tore away a portion of her neck, and she apparently died almost instantly. Such activities (the waiting, the following, and the shooting from a car window) clearly demonstrates that this premeditated homicide was a calculated and cold blooded execution. Such killing was done without any provocation on the part of the victim.

[4] Appellant argues that this homicide was not especially heinous, atrocious, or cruel, as described in section 921.141(5)(h), Florida Statutes (1979), and as interpreted by this Court, principally because there was instantaneous death from gunshot wounds with no "additional acts as to set the crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). We agree with the trial judge, however, and find that appellant's lying in wait for and stalking of Ms. Bovard, compounded by appellant's previous harassment of her, constitute sufficient "additional acts" to justify application of the heinous, atrocious, or cruel aggravating factor.

[5] Appellant also claims that the second aggravating factor, the aggravated assault conviction, should not be used to support the death sentence under the circumstances of the incident as he relates them. Appellant was afforded a full opportunity at the resentencing hearing to present evidence about the incident, and he does acknowledge that he was convicted in 1969 of aggravated assault. This conviction clearly is a proper aggravating circumstance for the trial judge to consider. § 921.141(5)(b).

[6] We agree with the trial judge's conclusion that no mitigating circumstances

existed sufficient to outweigh the aggravating factors in this case and find that the reimposed sentence was based on reasoned judgment. *Holmes v. State*, 374 So.2d 944 (Fla.1979). *See also Palmes v. State*, 397 So.2d 648 (Fla.1981). Further, we reject appellant's attempt to seek review of issues in this proceeding which could have been raised in the 1977 appeal. The reimposition of the death sentence is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., dissents with an opinion.

BOYD, Justice, dissenting.

For the reasons I stated when this case was originally before the Court on appeal, *Harvard v. State*, 375 So.2d 833, 835 (Fla. 1977), I dissent to the affirmance of the sentence of death and would direct that appellant be sentenced to life imprisonment without eligibility for parole for twenty-five years.

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JUNE 22, 1982

WILLIAM LANAY HARVARD,	**	
Appellant,	**	CASE NO. 47,052
vs.	**	Circuit Court Case No. 74-173-CF-A (Brevard)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., Concur
BOYD, J., Dissents

The Application for Stay of Judgment and Mandate filed by attorney for appellant is granted and the proceedings in this Court and the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida, are hereby stayed to and including July 22, 1982, to allow appellant to seek review in the United States Supreme Court and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Casseaux
Deputy Clerk

cc: Hon. Raymond C. Winstead, Jr., Clerk
Hon. Robert B. McGregor, Judge

Craig S. Barnard, Esquire
Richard B. Martell, Esquire

CHAPTER 921
SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60

days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—[illegible]

*Note.—Bracketed word inserted by the editors.

Note.—See former [illegible].

NO. 82-5444

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM LANAY HARVARD,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S SUPPLEMENTAL BRIEF

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NO. 82-5444

IN THE

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner, WILLIAM LANAY HARVARD, respectfully files this supplemental brief restricted to the intervening circumstance of this Court's granting of certiorari in Barclay v. Florida, certiorari granted on November 8, 1982, Case No. 81-6908, 51 U.S.L.W. 3362. This brief is filed as provided by Rule 22.6 of the Rules of this Court.

DISCUSSION

The case-at-bar squarely presents a federal question that must necessarily be decided by this Court in an intervening case where certiorari has been granted.

This Court recently granted certiorari in a Florida case that is procedurally and substantively similar to the present case and of necessity requires a decision of the question presented herein, Barclay v. Florida, ___U.S.___, 51 U.S.L.W.

3362 (1982), certiorari granted November 8, 1982, Case No. 81-6908.

In his petition for writ of certiorari filed in this Court on September 21, 1982, petitioner presented the question regarding the constitutional adequacy of the procedure employed in Florida where there has been a direct violation of Gardner v. Florida, 430 U.S. 349 (1977), Petition for Certiorari [hereafter "Pet."] 2. Petitioner's case had been remanded to the trial court by the Florida Supreme Court because of the Gardner violation and after reimposition of the death sentence was again appealed to the Florida Supreme Court which again affirmed the sentence. The question is therefore presented as to the propriety of the procedure followed in Florida where the death sentence had been imposed in violation of Gardner. This issue involves the propriety of the procedures utilized in the trial court -- notably the restricted scope of the allowable evidence (Pet. 7-11) -- and the procedures employed by the Supreme Court of Florida in reviewing a death sentence after a Gardner remand -- including the scope and method of review and the presumption of correctness given to the prior Gardner-violative death sentence (Pet. 10-11, 11-13).

Accordingly one of the primary aspects of the question presented in this case involves the adequacy of review by the Supreme Court of Florida after a Gardner-violative death sentence has been reimposed. Specifically petitioner challenges the failure by the Supreme Court of Florida to adequately

review the propriety of aggravating circumstances,[1] its refusal to weigh the aggravating and mitigating factors, its refusal to review the propriety of the proceedings before the jury in the capital penalty trial,[2] and its refusal to consider the ameliorative and mitigating evidence and argument, in the appeal from the Gardner remand. The lower court's reasoning

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1/For example, because it was applying a presumption of correctness of the prior Gardner-violative death sentence, the lower court gave only cursory review of the aggravating factors found by the trial judge. In upholding the aggravating factor of "especially heinous, atrocious, or cruel" the Florida Supreme Court relied primarily upon a fact not found by the trial court in the instant sentencing but which rather had been found in the prior Gardner-violative sentence. (See Pet. at 16). Its application of that aggravating factor was so vague and overbroad so as to violate the Eighth Amendment (Pet. 14-19). Also, in its prior opinion, before the Gardner remand, the court had upheld the sentence on the reasoning that there were no statutory mitigating circumstances, thereby indicating its unconstitutionally restricted view of the permissible scope of mitigating factors, but yet affirmed the reimposed death sentence on the presumption of correctness of that prior sentence. There were serious errors that the court refused to consider in its Gardner review.

2/There were several fundamental errors in the jury sentencing trial including the failure to allocate the burden of proof or to inform the jury that aggravating circumstances must be proven beyond a reasonable doubt; and the failure to define any of the aggravating factors for the jury, most notably "heinous, atrocious, or cruel" was undefined and unlimited. The Florida Supreme Court refused to review these questions, and this refusal highlights pellucidly the failings of the review in Gardner proceedings. There is a lack of any corrective process in that review and there is no independent or individualized consideration in such a method of review. The Supreme Court of Florida is apparently willing to allow a fundamentally defective death sentence to stand solely for the reason that it is reviewing it in a Gardner appeal. Such reasoning is legally improper, as expressed by the dissenting justices in Dougan v. State, 398 So.2d 439 (Fla. 1981): "The original sentence was vacated. If execution as ordered is to take place, then that execution must be predicated on the last-imposed sentence, which must be free from infirmities. Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own." Id. at 441.

was that such questions should not be reviewed in a Gardner-remand appeal.

The case of Barclay v. Florida, supra, upon which this Court granted certiorari, is in the identical procedural posture as the present case and of necessity requires resolution of the question presented in this case regarding the adequacy of the Gardner procedure in Florida. However, the instant case presents a more appropriate case than Barclay for review of the Gardner procedure.

The adequacy of the Florida Gardner procedure must necessarily be decided by this Court in Barclay because of the procedural posture in which Barclay reached this Court. Barclay came to this Court after an appeal from a Gardner remand and reimposition of the death sentence. And in such a posture, the Florida Supreme Court expressly refused to reach the question of the propriety of the aggravating or mitigating circumstances. Accordingly, this Court cannot reach the substance of the challenges to the aggravating circumstances (or indeed the issue proposed in respondent's supplemental brief in Barclay)[3/] unless it first rules that the Florida Supreme Court was in error in refusing to review the application of aggravating circumstances in the Gardner appeal.

While the question or questions upon which certiorari was granted in Barclay are not clear from the pleadings or from this Court's order, it is clear that the issue presented

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3/The issue proposed by respondent in Barclay at page 1 of its supplemental brief is:

> WHETHER THE FLORIDA SUPREME COURT PROPERLY UPHELD THE IMPOSITION OF THE DEATH PENALTY IN THE FACE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE.

by respondent's supplemental brief is not existent in Barclay except indirectly after the question of the Gardner-remand procedure is resolved.[4/] Some discussion of the history of Barclay is appropriate. In Barclay, the petitioner challenged none of the aggravating circumstances found in his case on his first appeal to the Florida Supreme Court, Barclay v. State, 343 So.2d 1266 (Fla. 1977). Thereafter, his death sentence was vacated pursuant to Gardner v. Florida, 430 U.S. 349 (1977), and his case was remanded for a limited re-sentencing proceeding before the trial judge only. Barclay v. State, 362 So.2d 657 (Fla. 1978). On appeal from the imposition of his death sentence, Barclay challanged for the first time the finding of three of the four aggravating circumstance in his case, and urged that these errors in assessing aggravating circumstances required that his death sentence be set aside. The Florida Supreme Court, however, refused to entertain

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4/Although the issue proposed by respondent's supplemental brief speaks in terms of an "improper aggravating circumstance" (see footnote 3, supra), no aggravating circumstance had been found to be invalid by the lower court in Barclay. Rather, the Florida Supreme Court expressly refused to review the propriety of the aggravating factors of Barclay because it was on review from a Gardner remand. In fact the supplemental brief by respondent in Barclay makes no specific reference to Mr. Barclay's case or the aggravating circumstance that its proposed issue assumes to be invalid. Rather the supplemental brief is the same as respondent filed in a number of cases in this Court. It is not case-specific and does not make clear for this Court the procedural posture of Barclay. The respondent's supplemental brief in Barclay is also somewhat contradictory to its brief in opposition therein where it was argued that since the case below was only on review from a Gardner remand, the issues presented were previously rejected by the lower court and this Court. Respondent's Brief in Opposition in Barclay at 7. Petitioner then went on to argue that there were no erroneous aggravating factors in Barclay's sentence. The issue proposed by respondent in Barclay is plainly not presented by the lower court decision under review and will only be presented if this Court first rules that the Florida Supreme Court should have reviewed the propriety of the aggravating circumstances in its decision below and then secondly finds an aggravating factor to be improperly applied.

this challenge since in its first review of Mr. Barclay's death sentence, 343 So.2d 1266, the court had sustained the findings of aggravating circumstances, 343 So.2d at 1271. The court limited its review to the narrow confines of the Gardner remand:

> "Barclay now challenges the imposition of the death sentence, primarily by argument against the findings previously reviewed here and affirmed. We cannot accept counsel's suggestion that we abrogate the 'law of the case.' [Citation omitted.] The dictates of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), have been met, and no defect in the original sentencing order has been identified as stemming from improper material in the PSI. There being no reason to consider matters previously analyzed, we again affirm the trial judge's sentence of death."

Barclay v. State, 411 So.2d 1310, 1311 (Fla. 1982). Thus, the Florida Supreme Court opinion upon which certiorari was granted did not decide the issue apparently presented for certiorari review. That opinion narrowly decided only that "no defect in the original sentencing order has been identified as stemming from improper material in the PSI." Id. And the Court expressly refused to consider the propriety of the aggravating factors.5/

Thus, Barclay presents the unique situation in which the foremost and prerequisite issue that must be decided -- the adequacy of the Florida Supreme Court's review after a Gardner remand --

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5/A strong indication that Barclay presents the Gardner question involved in the instant case and of its direct pertinence to this case, is the fact that respondent relies upon the Florida Supreme Court's decision in Barclay to support its position that the Gardner review procedure is adequate. Respondent's Brief in Opposition 5, 6, 9.

has not been raised by any of the parties and has not been briefed, and where the issue proposed as presented in the case was not decided by the lower court's opinion under review.

In contrast to the procedural quagmire of Barclay and the resultant enigmatic nature of the issues, the instant case directly presents the issue of the Florida Gardner procedure in all of its aspects -- the proceedings in the trial court and, pertinent specifically to Barclay, the method of review by the Florida Supreme Court in Gardner remand proceedings.

Accordingly, the instant case presents the appropriate case in which to decide the important question left open in Gardner. And it is a most appropriate question to be decided at this time since this Court has already accepted certiorari in a case where it inevitably must be decided. Since this is both the appropriate case and the appropriate time to consider the significant federal question, this Court should exercise its certiorari jurisdiction to review this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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BY _____
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IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5444

WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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I N D E X

TABLE OF CITATIONS

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I. OPINION BELOW

Petitioner seeks this Court's review of the decision of the Florida Supreme Court in Harvard v. State, 414 So.2d 1032 (Fla. 1982), hereinafter referred to as Harvard II (Appendix #1). Although Petitioner is correct in noting such opinion followed a remand for resentencing ordered by the Florida Supreme Court in Harvard v. State, 375 So.2d 833 (Fla. 1977), hereinafter referred to as Harvard I (Appendix #2), wherein the court affirmed Petitioner's conviction, it must be noted that his initial Petition for Certiorari denied by this Court in Harvard v. Florida, 441 U.S. 956, 99 S.Ct. 2185 (1979), raised issues pertaining to Petitioner's sentence of death (Appendix #3,4).

II. JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution are involved, as well as §921.141 Fla.Stat. (1973).

IV. STATEMENT OF THE CASE

Respondent does not accept Petitioner's Statement of the Case to the extent that it is argumentative and unsupported by the record; Respondent would note that such recitation contains no citation to the record at any juncture. Whereas much of the procedural history of this case recounted by Petitioner would seem accurate, Respondent would take strong exception to Petitioner's conclusory allegation that the sentencing judge ruled that "most" of the evidence regarding the prior Jacksonville offense, proffered by Petitioner, was beyond the scope of the remand and, therefore, refused to consider it (Petition at 3).

Because this is, in effect, the focus of one of the questions presented by Petitioner, Respondent would briefly review the "history" of the evidence presented regarding Petitioner's prior conviction for aggravated assault; such prior conviction was relied upon by the State to establish that aggravating circumstance set out in §921.141(5)(b) Fla. Stat (1973).

At the first sentencing hearing on June 24, 1974, the State called Petitioner's first wife, Betty Ann Phillips, and her sister, Mary Jane Sweat, the victim of the instant assault, to testify before the advisory jury (OSH 7-33;33-45). An additional witness, James Castle, a bailiff in the Duval County Court, was also called in order to identify Petitioner as the person whom he had fingerprinted in January 1970, following adjudication of guilt and rendition of sentence (OSH 45-48). All witnesses were subject to cross-examination and Petitioner himself took the stand to present his version of the incident (OSH 62-152).[1]

At the second sentencing hearing held in February 1979, Petitioner was handed a copy of the presentence report, which discussed the assault incident, and invited to correct or rebut any misstatements (R116-133; Appendix #5); additionally, Judge McGregor personally questioned him and elicited once again his version of the Jacksonville assault (R135-138; Appendix #6). As an adjunct to this procedure, Petitioner introduced into evidence an uncertified partial transcript of the probable cause hearing held in the Jacksonville proceeding in 1969 and called his former attorney, Charles Hess, to testify as to the inconsistencies between the testimony given at such proceeding by Mrs. Sweat and Mrs. Phillips and their testimony in 1974. At no time during such hearing did the judge ever reject any proffered evidence by Petitioner.

Such contention is supported by the statement of Petitioner's counsel at the time of imposition of sentence on August 22, 1979, when in arguing what had been presented at the earlier hearing, he noted that the judge had not excluded any testimony (R27). From the judge's comments at this time, however, it is clear that he had by now decided that some of the ex-post-facto attempts at impeachment of the missing witnesses, attempted by witness Hess, had been improper (R25). Once again, by May 16, 1980, when the judge rendered his written judgment on re-sentencing, it is plain that, despite having rejected no evidence

[1] In this Response OSH represents citations to the original sentencing hearing held in 1974; (R) designates citations to the record on appeal in Harvard II.

per se at the hearing itself, the judge had decided some of what he had listened to had been improper (Appendix #7). In its opinion, the Florida Supreme Court found no error in the judge's conduct of the hearing and noted that, if anything, he had allowed Petitioner to go "beyond what was necessary" in presenting evidence at the hearing. (See Harvard II at 1036).

V. HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

This section was omitted from the instant Petition, contrary to Rule 21(h), Rules of the United States Supreme Court. Respondent would contend that the second portion of Petitioner's question number two, that pertaining to the retroactivity of Godfrey v. Georgia, 446 U.S 420, 100 S.Ct. 1759 (1980) and to an alleged lack of adequate instruction to the jury on the meaning of the term, "heinous, atrocious and cruel", §921.141 (5)(h) Fla.Stat. (1973), is not properly before this Court. At the time that the sentencing jury was instructed on June 24, 1974, the record indicates no objection or request by Petitioner for further explanation of any terms; such failure to comply with Florida's contemporaneous objection rule has been viewed by Florida appellate courts, except in cases of fundamental error, as barring review. Castor v. State, 365 So.2d 701 (Fla. 1978). Additionally, the above points were not presented to the Florida Supreme Court in Petitioner's Initial Brief challenging his conviction and sentence (See Appendix #8). Whereas the applicability of Godfrey could not have been argued prior to 1980, Respondent would submit that Petitioner, had he been truly prejudiced, could have asserted a lack of definition of any "vague" term in the jury instructions at such a time. While Petitioner did raise such issues in his Initial Brief following resentencing, in its opinion the Florida Supreme Court expressly noted that it would not review any issues which could have been raised in the 1977 appeal (Harvard II at 1037).

In Cardinale v. Louisiana, 394 U.S.437, 438, 89 S.Ct. 1161 (1969), this Court noted that it was well established that it would not decide federal constitutional issues raised here

for the first time on review of State decisions. Similarly, in Street v. New York, 394 U.S.576, 582, 89 S.Ct. 1354 (1969), this Court declared that when the highest court of the state has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show otherwise. See also Fuller v. Oregon, 417 U.S.40, 94 S.Ct. 2116 (1974); Herndon v. Georgia, 295 U.S. 441, 55 S.Ct. 794 (1935); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962); Webb v. Webb, ___U.S.___, 101 S.Ct. 1889 (1981).

Inasmuch as the Florida Supreme Court expressly declined to rule upon Petitioner's point regarding jury instructions, and such point was not preserved for review, Respondent would conclude that such question is not properly before this Court. Additionally, to an extent "preservation" arguments can be made as to the other points raised in the Petition, in that there was no contemporaneous objection by Petitioner's counsel to any restriction in the scope of the resentencing hearing and, in that the propriety of the Court's finding of that aggravating circumstance, that the murder committed had been especially "heinous, atrocious and cruel", pursuant to §921.141(5)(h), was most properly raised only in Petitioner's first appeal. However, inasmuch as the Florida Supreme Court addressed both such concerns in Harvard II, it would seem that they may properly be considered by this Court. Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 (1974).

VI. REASONS FOR NOT GRANTING THE WRIT

A. WHETHER PETITIONER HAS DEMONSTRATED A DENIAL OF DUE PROCESS THROUGH THE MANNER IN WHICH FLORIDA COURTS HAVE REDRESSED A "GARDNER" [GARDNER V. FLORIDA, 430 U.S.349, 97 S.Ct. 1197 (1977)] VIOLATION (RESTATED).

As has been noted, Petitioner's conviction and sentence of death were both initially affirmed by the Florida Supreme Court, although in light of the intervening decision of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977), the sentence was vacated and the cause remanded to the trial court to provide Petitioner an opportunity to explain, contradict,and argue

regarding the relevance, materiality, and import of the confidential information and military history, "as well as other matters properly considered by the trial court concerning Appellant's sentence under §921.141, Fla. Stat. (1977)". Harvard I at 835. The Court also expressly noted that convocation of an advisory jury was unnecessary. To Respondent's knowledge, similar relief, following similar Gardner violations, has been fashioned by the Florida Supreme Court in such cases as Dobbert v. State, 328 So.2d 433 (Fla. 1976), cert.granted and affirmed, Dobbert v. Florida, 432 U.S.282, 97 S.Ct. 2290 (1977), affirmed after remand, Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied 447 U.S. 912, 100 S.Ct. 3000 (1980); Songer v. State, 322 So.2d 481 (Fla. 1975), cert.granted, Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594 (1977), affirmed after remand, Songer v. State, 365 So.2d 696 (Fla. 1978), cert.denied 441 U.S.956, 99 S.Ct. 2185 (1979); Funchess v. State, 341 So.2d 762 (Fla. 1977), cert. denied 434 U.S.878, 98 S.Ct. 31 (1977), remanded 367 So.2d 1007 (Fla. 1979), affirmed after remand, 399 So.2d 356 (Fla. 1981), cert.denied, ___U.S.___, 102 S.Ct.493 (1981); Barclay and Dougan v. State, 343 So.2d 1266 (Fla. 1977), cert.denied 439 U.S.892, 99 S.Ct. 249 (1978), remanded 362 So.2d 657 (Fla. 1978), affirmed after remand, Dougan v. State, 398 So.2d 439 (Fla. 1981), cert. denied, ___U.S.___, 102 S.Ct. 367 (1981), affirmed after remand, Barclay v. State, 411 So.2d 1310 (Fla. 1981). Petitioner has failed to demonstrate that the Florida courts in this case have somehow failed to adhere to Gardner, supra, or that, in contrast to those cases above, Petitioner has been denied due process.

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), this Court found Florida's capital-sentencing procedure to be on its face, free from constitutional infirmities; part of such procedure is a provision that it is the judge, as opposed to the advisory jury, who determines the ultimate sentence. An advisory sentence of life can be overridden only when the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. See Tedder v. State, 322 So.2d 908,(Fla.1975); Proffitt at 249; Dobbert v. Florida

at 296. One must note that in Gardner v. State, 313 So.2d 675 (Fla. 1975), the jury recommended life imprisonment and, when this Court vacated Gardner's death sentence in Gardner v. Florida, supra, owing to a violation of due process in failing to allow the defendant to deny or explain portions of the confidential presentence report, one of the factors cited was that the only matter considered by the judge, but not the jury, had been the confidential report. In other words, the jury had seen all witnesses and testimony and recommended life, one was left to speculate that, but for this unseen report, the judge would have done likewise. This Court remanded Gardner to the courts of this state with directions to hold "further proceedings at the trial level not inconsistent with this opinion".

Anticipating future Gardners, however, the Florida Supreme Court directed all sentencing judges in capital cases to advise whether or not they had relied upon confidential, undisclosed information. Upon receiving affirmative responses, Harvard, as well as those cases cited previously, Songer, Dobbert, Funchess, Dougan, and Barclay were remanded to the trial courts, regardless of their appellate status. The order of remand in Funchess, 362 So.2d 1007, is identically worded to that at the close of the first Harvard opinion. Harvard I at 835. The scope of the subsequent sentencing hearing was an issue in every appeal, following remand, excepting in Dobbert. The Florida Supreme Court has repeatedly held that the "scope" of a resentencing hearing held to correct a Gardner violation is limited to the presentation by the defendant of his explanation or rebuttal of previously undisclosed matters in the presentence report. Songer, 365 So.2d at 699; Dougan, 398 So.2d at 440, Funchess, 399 So.2d at 356; Barclay, 411 So.2d at 1310-1.

Thus, any "restriction" in the scope of Petitioner Harvard's resentencing hearing was not without precedent and Respondent would question why this case presents, as Petitioner avers, the proper case to resolve the pellucidly-highlighted defects in post-Gardner proceedings. As opposed to Petitioner Gardner, the advisory jury in the instant case recommended death;

Harvard's sentence is not even arguably predicated upon the confidential report alone. Additionally, Respondent would contend that Petitioner has failed to demonstrate any denial of due process, in that despite his voluminous petition, and frequest protests otherwise, nowhere does he expressly indicate what evidence he was precluded from arguing at the hearing.

As noted previously, Petitioner was handed copy of the presentence report at the hearing in February 1979 (See Appendix #5) and asked to make his corrections; his version of the earlier Jacksonville incident was expressly solicited by the judge (See Appendix #6). In his sentencing order, the judge indicated that such testimony had not been persuasive; inasmuch as the sole purpose of the hearing was to elicit such, the remand, must, nevertheless, be adjudged a success. At most, Petitioner was denied the opportunity to have his counsel, George Hess, testify fully as to the inconsistencies and testimony between that given by Mrs. Sweat and Mrs. Phillips in 1969 and 1974 respectively. Inasmuch as the "best evidence" of such inconsistency, the transcript of the 1969 hearing, was introduced into evidence, and the judge's order indicates that he had perused such and compared the testimony on his own, any "error" must be harmless (Appendix #7). The only real restriction, if in fact such exists, may have been the sentencing judge's disinclination to hear Witness Hess's speculation as to why Petitioner had received the sentence which he did in 1970; Judge McGregor seems to have balked at having a judge's thought processes second-guessed.

Petitioner has cited to this Court no prior decision of the Florida Supreme Court in which, in order to "explain" a prior conviction, the defendant has been able to introduce evidence as to the earlier judge's thought processes. Respondent would conclude that the above represents a flimsy rod upon which to base a Petition for Writ of Certiorari to the nation's highest court and would conclude that the proceedings conducted in Petitioner's case were consistent with this Court's mandate and holding in Gardner, such that certiorari would not be appropriate.

VI (Cont) B. WHETHER THE FINDING OF THAT AGGRAVATING CIRCUMSTANCE SET OUT IN SECTION 921.141(5)(H), SUB JUDICE, REPRESENTS SUCH A VAGUE AND OVERBROAD APPLICATION AS TO DENY PETITIONER DUE PROCESS (RESTATED).

As noted previously, this Court found §921.141 Fla. Stat. (supp. 1976-1977) to be constitutional on its face; in the course of doing so, this Court found that aggravating factor pertaining to the crime being "especially heinous, atrocious and cruel", §921.141(5)(h), as not being so vague and overbroad as to provide inadequate guidance to those charged with recommending or imposing sentences in capital cases. Proffitt at 255-266. Petitioner is apparently arguing that the finding of such aggravating factor in this case was a misapplication of the law, although his petition fails to pellucidly highlight the precise constitutional right which he feels has been violated.

Petitioner has begun his argument with a lengthy summary of the facts from which all citations to the record on appeal have been omitted. Respondent would contend that such a presentation is inapposite in this context, inasmuch as this Court will not reweigh the evidence in a petition for certiorari, any more than in its scope of review, the Florida Supreme Court would do more than assure that sufficient competent evidence existed to sustain the finding of an aggravating or mitigating circumstance. See Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, __ U.S. __, 102 S.Ct. 542 (1981); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Hargrave v. State, 366 So.2d 1 (Fla. 1978). To a large extent, despite its "constitutional" dressing, Respondent would contend that this point of Petitioner's represents, in effect, an impermissible suggestion for this Court to substitute its judgment for that of the sentencing judge on a question of fact.

In both Harvard I and Harvard II, the Florida Supreme Court upheld the sentencing judge's finding of §921.141(5)(h). Regardless of the actual words used, and any variation between opinions, the Court felt that Appellant's conduct and the

manner in which he murdered his ex-wife supplied the "additional acts" necessary to remove this killing from the "norm". In finding that the instant killing was especially heinous, atrocious and cruel, the Florida Supreme Court felt that it was in harmony with its own earlier decision of State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951 (1974). In effect Petitioner is asking this Court to declare that Florida has misapplied its own law, an impermissible request on a petition for certiorari. The "additional acts" identified as making appropriate the death penalty were Petitioner's earlier harassment of his ex-wife, as well as his lying in wait for and stalking of her on the night of her murder, prior to his blowing a huge gap in her neck with a shotgun. While it is undoubtedly true that, searching through other capital cases in Florida, one could come upon a "bloodier" set of facts, it is additionally true that the Florida Supreme Court has previously upheld the finding of this aggravating circumstance in instances in which the killings were particularly consciousless or pitiless. See Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Gibson v. State, 351 So.2d 948 (Fla. 1977); Holmes v. State, 374 So.2d 944 (Fla. 1979). Thus, while the Florida Supreme Court has on occasion declared erroneous the finding of §921.141(5)(h) in instances such as those in which a hostage has been killed with a single burst of machinegun fire following his sudden rush of the gunman, Fleming v. State, 374 So.2d 954 (Fla. 1979), or where a robbery victim has been summarily dispatched, Armstrong v. State, 399 So.2d 953 (Fla. 1981), the court has additionally upheld the finding of "heinous, atrocious and cruel" in instances in which the sentencing judge has noted in his findings the fact that the defendant had stalked the victim prior to his murder. See Barclay v. State, 343 So.2d at 1269. Additionally, one must note that the "cold and calculated" nature of a killing has been legislated into a new aggravating circumstance, §921.141(5)(i) Fla. Stat. (1979). While such finding would not have been available to the sentencing judge per se sub judice, the first Florida decision

to expressly construe this section, Combs v. State, 403 So.2d 418 (Fla. 1981), noted that such execution-style killings had previously been found to warrant the death penalty, presumably under §921.141(5)(h), as evidenced by its citation of Sullivan v. State, 303 So.2d 632 (Fla. 1974) (Overton, J. concurring), cert. denied, 428 U.S. 911, 96 S.Ct. 3226 (1976). See also Alvord v. State, 322 So.2d 533 (Fla. 1975); Magill v. State, 386 So.2d 1188 (Fla. 1980).

It is, of course, one of the reviewing functions of the Florida Supreme Court to decide whether the sentence of death is disproportionate in any particular case, when viewed against all prior cases in which it has been imposed. Petitioner has failed to demonstrate that the Florida Supreme Court has failed in its mandate to do such sub judice. Petitioner largely bases his "freakishness" argument on a creature of his own making, his conclusion that there has been an unwritten rule that death would not be imposed in killings which result from bitter divorces or love triangles. Whereas the death penalty was in fact vacated in such cases as Tedder v. State, 322 So.2d 908 (Fla. 1975), Chambers v. State, 339 So.2d 204 (Fla. 1976) and Phippen v. State, 389 So.2d 991 (Fla. 1980), all arguably "domestic" cases relied upon by Petitioner, the primary reason for such vacation was that the sentence of death in each case represented an override by the judge of a jury's advisory verdict of life imprisonment, which, in the view of the Florida Supreme Court, was not supported by clear and convincing proof that the initial verdict had been faulty. Similarly, in the other three "domestic" cases cited by Petitioner, Haliwell v. State, 323 So.2d 557 (Fla. 1975), Kampff v. State, 371 So.2d 1007 (Fla. 1979) and Blair v. State, 406 So.2d 1103 (Fla. 1981), vacation of the death sentence can be explained by the fact that in all three the court held that the sentencing judge had erroneously failed to find mitigating circumstances, and that in Haliwell and Blair, the finding of heinous, atrocious and cruel was based upon conduct directed toward the body of

the already-deceased victim. Although, the Court has, in its factual summary of each case, noted the relationship of the parties, it has never declared such to be a factor in and of itself or a pseudo-mitigating circumstance. There has been, thus, no deviance from an precedent in this area.

In addition to making a factual argument, and an argument based solely on Florida case law, Petitioner has sought to establish conflict between the instant decision and that of this Court in Godfrey v. Georgia, supra. Respondent would briefly reiterate its argument that Petitioner's claims as to the jury definition of the aggravating circumstance at issue were not adequately preserved or presented in the Florida courts and, in light of the long line of Florida Supreme Court cases interpreting the term, would resist any attempt by Petitioner to equate "heinous, atrocious or cruel", with those terms at issue in Godfrey. There are, additionally, two primary distinctions which must be drawn between Godfrey and the instant case, both of which are fatal to Petitioner's argument. Firstly, in Godfrey, the defendant's sentence of death was based upon no more than a finding that the offense had been "outrageously or wantonly vile, horrible and inhuman", an aggravating circumstance under the Georgia statute. Petitioner Harvard's sentence of death is predicated upon the finding of two aggravating circumstances, §§921.141(5)(b) and (h), as well as the finding of no mitigating circumstances. Under Florida case law, the erroneous finding of one aggravating circumstance, in a situation where there are no mitigating, and where at least one such aggravating has been properly found, would not serve as a basis for vacating a sentence of death. See Elledge v. State, 346 So.2d 998 (Fla. 1977). In one of the cases, earlier relied upon by Petitioner, striking of the finding of "especially heinous, atrocious or cruel" did not result in vacation of the death penalty. See Armstrong, supra.

The primary distinction between Godfrey and the instant case, however, relates to the difference in the capital

sentencing procedures in Florida and Georgia. In Godfrey, the jury "found" the aggravating circumstance and pronounced a binding sentence upon the defendant; in Harvard, although the jury recommended death, such sentence was merely advisory. The reasoned judgment of the sentencing judge, as well as review by the Florida Supreme Court, stood or stands between Petitioner and the imposition and execution of his sentence; we are not dealing with the "uncontrolled discretion of a basically uninstructed jury", but rather the actions of a trial judge who, if anything, in Petitioner's eyes, took too long in rendering his decision and findings in support thereof. The key to success for Petitioner lies not in drawing similarities between the instant case and Godfrey, for he is bound to fail in that endeavor, but rather in establishing that somehow, in the instant case, the Florida Supreme Court has so abused its own capital sentencing procedure, approved by this Court in Profitt v. Florida, supra, that a petition for writ of certiorari is the only remedy. He has not made such showing.

Adherence to the statutory aggravating and mitigating circumstances is what "channels" the discretion of sentencing judges in Florida. Petitioner has not convincingly demonstrated that the actions of Judge McGregor starkly deviated from those of all his predecessors. By definition, an especially "heinous, atrocious or cruel" homicide is one which contains additional acts which set it apart from the norm of capital felonies and which is a crime, consciousless or pitiless and unnecessarily torturous to the victim. There has been no allegation that as in Georgia, Florida requires physical "torture" or battery in order to qualify for such definition. Judge McGregor found that Petitioner's prior and constant harassment of his ex-wife as well as his stalking and lying in wait for her were not the "norm"; as noted previously, Judge McGregor was not the only one to include "stalking" in his findings of fact as to this aggravating circumstance. See Barclay, supra.

While it may indeed be true, as Petitioner avers, that Petitioner Harvard would be the first husband to be sentenced to death in Florida for the killing of his ex-wife, it is probably equally true that he is the first person convicted of killing his second ex-wife, after unsuccessfully trying to murder his first. The inalterable truth remains that Petitioner cannot explain away his prior conviction for aggravated assault, during which he put a bullet in the face of his sister-in-law and shot his first wife in the head. None of the other disgruntled husbands or frustrated fiancees cited by Petitioner quite rose to this level of misconduct; as noted previously, the finding of that aggravating circumstance relating to Petitioner's prior conviction of a felony involving the use of threat of violence to a person, §921.141(5)(b), could alone serve as the basis for Petitioner's sentence of death. To adopt Petitioner's argument and to exclude entire classes of criminals or crimes, i.e. "domestic" crimes, from "eligibility" for a capital sentence, would be a step in the direction of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), rather than away from it. Petitioner Harvard's sentence was particularly geared to "fit" the crime, the purpose of any individualized and non-arbitrary capital sentencing scheme. Petitioner has failed to demonstrate that the sentencing judge's finding of fact in support of the aggravating circumstance at issue, as well as the Florida Supreme Court's scope of review in this case, were both so constitutionally infirm that federal certiorari must lie.

VII. CONCLUSION

Based upon the above argument, the instant petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RICHARD B. MARTELL, Counsel for the State of Florida, the Respondent, hereby certify that on October 21, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Response to Petition for Writ of Certiorari with attached appendix on Craig S. Barnard, Chief Assistant Public Defender, 224 Datura Street/13th Floor, West Palm Beach, Florida, 33401, Attorney for Petitioner, by depositing said copy in a United States Mail Box, with first class postage prepaid, properly addressed.

Richard B. Martell
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5444

WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

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INDEX

APPENDIX

William Lanay HARVARD, Appellant,

v.

STATE of Florida, Appellee.

No. 47052.

Supreme Court of Florida.

April 15, 1982.

Following remand for resentencing, 375 So.2d 833, the Circuit Court, Brevard County, Robert B. McGregor, J., reimposed the death sentence, and defendant appealed. The Supreme Court held that: (1) nine-month delay between announcement of sentence at conclusion of *Gardner* rehearing and issuance of written final judgment was not reversible error; (2) resentencing hearing was not required to be had before a new judge; (3) trial judge went beyond what was necessary in allowing defendant to present evidence in rebuttal of confidential information previously considered; and (4) defendant's lying in wait for and stalking former wife, compounded by prior harassment of her, constituted sufficient additional acts to justify application of the heinous, atrocious or cruel aggravating factor.

Affirmed.

Boyd, J., filed dissenting opinion.

1. Criminal Law ⇐996(3)

Nine-month delay between announcement of reimposition of death sentence at conclusion of *Gardner*-mandated resentencing and issuance of written final judgment did not demonstrate that the trial judge failed to properly weigh aggravating and mitigating factors and although there was no reversible error in manner in which the trial judge rendered his decision, announcement of the decision and filing of written findings should be done simultaneously. West's F.S.A. § 921.141.

2. Criminal Law ⇐996(3)

Gardner-mandated capital resentencing hearing was not required to be held before

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a different judge as against contention that because original trial judge considered confidential matters in imposing the death sentence he could have been influenced thereby on resentencing. West's F.S.A. § 921.141.

3. Constitutional Law ⇐270(2)
Criminal Law ⇐996(3)

At *Gardner* mandated capital resentencing, i.e., resentencing required because the trial judge considered information which defendant had no opportunity to deny or explain, the trial judge did not erroneously limit presentation of evidence concerning events underlying an aggravated assault conviction which was used as a statutory aggravating circumstance in initial sentencing and defendant was not denied due process because of refusal to admit some portions of testimony offered by his former attorney relative to the assault conviction. West's F.S.A. § 921.141(5)(b); U.S.C.A.Const.Amend. 14.

4. Homicide ⇐354

Although former wife's death was almost instantaneous due to gunshot wound, defendant's lying in wait for and stalking his former wife, compounded by his previous harassment of her, constituted sufficient "additional acts" to justify application of the heinous, atrocious or cruel aggravating factor necessary for the death sentence. West's F.S.A. § 921.141(5)(h).

See publication Words and Phrases for other judicial constructions and definitions.

5. Homicide ⇐354

Aggravated assault conviction based on incident of violence to defendant's first wife's sister was a proper aggravating circumstance in imposing death sentence for fatal shooting of second ex-wife. West's F.S.A. § 921.141(5)(b).

6. Criminal Law ⇐996(3)

Matters which could have been raised on appeal resulting in affirmance of conviction could not be raised in subsequent proceedings on *Gardner* remand, i.e., remand for capital resentencing because the court had initially considered confidential information that was not revealed to the defendant. West's F.S.A. § 921.141.

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Chief Asst. Public Defender and Richard B. Greene, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for appellant.

Jim Smith, Atty. Gen. and James Dickson Crook, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is an appeal from a death sentence which was reimposed upon appellant after a resentencing hearing pursuant to an order of this Court contained in *Harvard v. State*, 375 So.2d 833, 835 (Fla.1978) (on rehearing). We have jurisdiction under article V, section 3(b)(1), Florida Constitution. We affirm.

To properly address the issues, it is necessary to establish chronologically the events culminating in this proceeding. Appellant was convicted in 1974 of first-degree murder for the shooting death of his second ex-wife, Ann Bovard. The facts of this murder, described in more detail in our original opinion, reflect that appellant waited in his automobile for Ms. Bovard to leave her place of employment, then followed her for some distance, pulled alongside her car, and discharged a shotgun blast into her neck, killing her instantly. The jury recommended the death penalty and the trial judge agreed, imposing the death sentence after concluding that no mitigating circumstances existed to outweigh the applicable aggravating circumstances.

While this case was pending on appeal before this Court, the United States Supreme Court, in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), decided that it is a denial of due process for the death sentence to be imposed if the trial judge, in weighing the aggravating and mitigating circumstances of the case, considers confidential information which the defendant had no opportunity to deny or explain. As a result of this U.S. Supreme Court decision, this Court di-

rected all trial judges in the state to advise the Court whether they had imposed the death sentence in consideration of any information not known to the defendants. The trial judge in the instant case responded that he had, in fact, considered a confidential portion of the presentence investigation report and information regarding appellant's military record, furnished by the United States Marine Corps, which had not been made available to appellant or his counsel.

We affirmed the conviction of appellant, but, to comply with the *Gardner* decision, we vacated the death sentence and remanded the case for resentencing, stating that the hearing would be

> without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military history, as well as other matters properly considered by the trial court concerning appellant's sentence. . . .

Harvard, 375 So.2d at 835. The trial judge proceeded in accordance with this direction and, at the conclusion of the resentencing proceeding, reimposed the death sentence. In this appeal, appellant argues that the *Gardner* remand resentencing procedure denied him due process of law.

[1] Appellant first attacks the procedures used by the trial judge in reimposing the death sentence, arguing that the nine-month delay between the announcement of the sentence at the conclusion of the hearing and the issuance of the written final judgment of resentencing demonstrates that the trial judge failed to properly weigh the aggravating and mitigating factors. We find no reversible error in the manner in which the trial judge rendered his decision, although we suggest that the announcement of the judge's decision and the filing of written findings should be done simultaneously. The judge reimposed the death sentence after considering all of the information available to him, including the evidence presented at resentencing. His conclusion that the death sentence was again appropriate clearly indicates that his finding is based upon the failure of the defense to present sufficient evidence at resentencing to rebut the information contained in the confidential portion of the presentence investigation report or in the military records. The written order expressly states that the defendant had failed to show harm or errors in the confidential matters considered in the original sentencing procedure. The evidence in this record not only confirms that finding, but it also reflects that the confidential information was primarily cumulative in light of the evidence actually presented at the original sentencing hearing. We find no error.

[2] The second error alleged by appellant is the trial judge's refusal to assign the resentencing hearing to a new judge. Appellant argues that because the original trial judge considered confidential material in imposing the first death sentence, he could have been influenced at resentencing by this improper information and by his prior ruling. We reject this argument. This case was remanded to comply with the rule announced in *Gardner*, and nothing in *Gardner* requires the assignment of a new judge to conduct the resentencing procedures. Furthermore, trial judges are routinely made aware of information which may not be properly considered in determining a cause. Our judicial system is dependent upon the ability of trial judges to disregard improper information and to adhere to the requirements of the law in deciding a case or in imposing a sentence. *Alford v. State*, 355 So.2d 108 (Fla.1977). The written judgment of resentencing in this case is detailed, logical, and fully supported by the record.

[3] Appellant next claims that, at resentencing, the trial judge erroneously placed limitations on his presentation of evidence concerning the events which resulted in his 1969 conviction of a felony involving violence to his first wife's sister. This conviction constitutes a statutory aggravating circumstance under section 921.141(5)(b), Florida Statutes (1979). At the original sen-

tencing hearing in 1974, the state presented evidence of the aggravated assault conviction, consisting of the testimony of the victims in the incident, Betty Ann Phillips (Harvard's first wife) and her sister, Mary Jane Sweat. Ms. Phillips described the attack in her 1974 testimony:

A Well, we arrived at the house and we walked in and I had noticed the kids' suitcase sitting in the hall and knew something was wrong and we both just looked at each other. About that time Mr. Harvard stepped out of the side closet and he had a small pistol in his hand and he looked at me and said, "I told you the next time you took me back to court I would kill you" and Mary—

Q Is that your sister?

A They started talking about his mother and I had talked to Mr. Harvard, too, about if I wanted us to go back together he would. Just by talking to him, I knew what he was there for, and they kept on, Mary, arguing about his mother, that he told her that she had called him and told her things that weren't true and Mary said she called his mother and told her about how he was acting. And that was all that she had said to his mother. And, about that time, Mr. Harvard moved his hand up and shot her right in the face and I had screamed and Mary took off for the front door and he shot her again, going out the door. And then I ran out the back door and, about that time, I was standing there beside the carport where I was and he pushed me down to the ground and I remember his foot going on my back and that is all I remember.

Q Were you shot?

A Yes, sir.

Q Where?

A On the top of the head.

This testimony is reflected in the original sentencing order and in the first opinion of this Court, although neither the state nor the appellant brought to the attention of the trial court or of this Court in the original appeal the fact that the offense to which appellant pleaded guilty was the assault against his sister-in-law rather than an assault against his first wife. The trial judge corrected that error in his findings on resentencing. In the 1974 hearing, appellant testified in his own behalf regarding the incident, characterizing the shootings as accidental. The confidential presentence investigation report also included a summary of the events surrounding the Jacksonville incident which is consistent with the testimony at the original sentencing hearing.

Appellant complains that he was denied due process in the second sentencing hearing because the trial judge refused to admit some portions of the testimony offered by appellant's former attorney relative to the 1969 proceeding. The record shows that the trial judge liberally allowed appellant to present considerable testimony and evidence concerning the assault charge. Appellant testified in his own behalf, was allowed to present the testimony of his former lawyer, and was also allowed to introduce an unauthenticated transcript of the 1969 preliminary hearing. In his testimony, appellant again principally disagreed with the characterization placed on these 1969 shootings by both victims' testimony and in the summary contained in the presentence investigation report. He admitted he shot his first wife and her sister, but excused his actions in part because of what he perceived as the misconduct of these women.

To a limited extent, the trial judge allowed appellant's 1969 attorney to testify concerning his recollection of the inconsistencies in the testimony presented by the first wife at the preliminary hearing in 1969 as compared to her testimony at the sentencing hearing in 1974. In his resentencing order, the trial judge directly addressed this asserted impeachment of the first wife's testimony in the 1974 sentencing proceeding, stating:

Such impeachment should have been done at the time of trial and it therefore appears that this was a wrongful attempt to

belatedly impeach evidence presented by the State to the advisory jury. The Supreme Court's Remand was not for this purpose. As to the testimony contained in transcript of the proceedings of the probable cause hearing before the Justice of the Peace in Jacksonville in 1969, (more than five years earlier than the testimony of the former wife and the former sister-in-law during the bifurcated sentencing phase), this Court finds it to be substantially (and remarkably so for the passage of time involved) consistent and uncontradicting.

This Court's remand for resentencing was for the purpose of redressing a *Gardner* violation. Under our order, the trial judge was obligated to consider the evidence offered by appellant to explain, contradict, or rebut information which had been previously undisclosed to appellant or his counsel. We conclude that the trial judge went beyond what was necessary in allowing appellant a full opportunity to present evidence at the resentencing hearing in rebuttal of the confidential information previously considered; we find no error.

In his final assertion of error, appellant argues that the aggravating factors of heinous, atrocious, and cruel and of a previous conviction of a violent felony were improperly applied and that the trial judge failed to adequately consider mitigating circumstances. The conclusion that this murder was heinous, atrocious, and cruel was based upon the following analysis in the resentencing order:

> While the defendant and Ann Bovard had been divorced approximately two months, they had been separated for several months, and during the separation the defendant had engaged in a series of harassing actions. In addition, the defendant enclosed in a Christmas card he sent to Ann Bovard in December, 1973, a note saying, "You will never see Christmas." In January, 1974, after the divorce, the defendant told a coworker that he would "do anything to get her out of his hair." On the night of the killing, February 16, 1974, the defendant waited outside of his second former wife's place of employment, and when she left he followed her for approximately ten miles to the entrance of the subdivision in which Ann Bovard lived, where he pulled up close beside her apparently momentarily stopped vehicle and with a 12-gauge shotgun shot her in the neck with a shot shell loaded with pellets. The blast tore away a portion of her neck, and she apparently died almost instantly. Such activities (the waiting, the following, and the shooting from a car window) clearly demonstrates that this premeditated homicide was a calculated and cold blooded execution. Such killing was done without any provocation on the part of the victim.

[4] Appellant argues that this homicide was not especially heinous, atrocious, or cruel, as described in section 921.141(5)(h), Florida Statutes (1979), and as interpreted by this Court, principally because there was instantaneous death from gunshot wounds with no "additional acts as to set the crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). We agree with the trial judge, however, and find that appellant's lying in wait for and stalking of Ms. Bovard, compounded by appellant's previous harassment of her, constitute sufficient "additional acts" to justify application of the heinous, atrocious, or cruel aggravating factor.

[5] Appellant also claims that the second aggravating factor, the aggravated assault conviction, should not be used to support the death sentence under the circumstances of the incident as he relates them. Appellant was afforded a full opportunity at the resentencing hearing to present evidence about the incident, and he does acknowledge that he was convicted in 1969 of aggravated assault. This conviction clearly is a proper aggravating circumstance for the trial judge to consider. § 921.141(5)(b).

[6] We agree with the trial judge's conclusion that no mitigating circumstances

existed sufficient to outweigh the aggravating factors in this case and find that the reimposed sentence was based on reasoned judgment. *Holmes v. State*, 374 So.2d 944 (Fla.1979). *See also Palmes v. State*, 397 So.2d 648 (Fla.1981). Further, we reject appellant's attempt to seek review of issues in this proceeding which could have been raised in the 1977 appeal. The reimposition of the death sentence is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., dissents with an opinion.

BOYD, Justice, dissenting.

For the reasons I stated when this case was originally before the Court on appeal, *Harvard v. State*, 375 So.2d 833, 835 (Fla. 1977), I dissent to the affirmance of the sentence of death and would direct that appellant be sentenced to life imprisonment without eligibility for parole for twenty-five years.

William Lanay HARVARD, Appellant,

v.

STATE of Florida, Appellee.

No. 47052.

Supreme Court of Florida.

April 7, 1977.

Rehearing Denied Nov. 2, 1978.

Certiorari Denied May 14, 1979.
See 99 S.Ct. 2185.

Defendant was convicted before the Circuit Court, Brevard County, Robert B. McGregor, J., of murder in the first degree and was sentenced to death, and he appealed. The Supreme Court held that in a capital case it is for the court to evaluate anew the aggravating and mitigating circumstances to determine whether the death sentence is appropriate and that where defendant had previously been convicted of a felony involving violence against person, which conviction resulted from his attempted murder of one former wife, and instant prosecution was based on killing of another former wife by stalking her in the dark and then in cold blood killing her with shotgun at close range, there was sufficient aggravating circumstances to warrant imposition of the death penalty but that defendant was entitled to rebut certain information relied on by the court in imposing sentence.

Conviction affirmed and remanded for resentencing.

Boyd, J., concurred in part and dissented in part with an opinion.

Hatchett, J., concurred in part and dissented in part with an opinion.

1. Criminal Law ⇐1134(1)

When the death sentence is imposed, it is the responsibility of the Supreme Court to evaluate anew the aggravating and mitigating circumstances to determine whether such punishment is appropriate; the court must also insure that punishment for murder is evenly applied so that similar homicides draw similar penalties. West's F.S.A. Const. art. 5, § 3(b)(1); West's F.S.A. § 921.141(3).

2. Homicide ⇐354

Where defendant had previously been convicted of a felony involving violence against a person, which conviction resulted from his attempted murder of a former wife, and instant case involved killing of another former wife by stalking her in the dark and then in cold blood killing her with a shotgun at close range, there were sufficient aggravating circumstances to warrant imposition of the death penalty. West's F.S.A. § 921.141(3).

On Petition for Rehearing

3. Criminal Law ⇐1188

Where in imposing death sentence the trial court considered confidential portion of presentence investigation report and information furnished as to defendant's military record but neither was furnished to counsel for the State or defendant prior to sentencing, remand for resentencing was required, although without necessity of convening an advisory jury, with defendant entitled to opportunity to explain, contradict, etc., the materiality and import of the confidential information and military history. West's F.S.A. § 921.141.

Richard L. Jorandby, Public Defender, Bruce Zeidel and Craig S. Barnard and Jerry L. Schwarz, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin and Michael H. Davidson, Asst. Attys. Gen., for appellee.

PER CURIAM.

This is an appeal from a conviction of murder in the first degree and a sentence of death. We have jurisdiction.[1]

Shortly after midnight on February 16, 1974, appellant William Lanay Harvard sat

1. Art. V, § 3(b)(1), Fla.Const.

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in his car near Cocoa Beach and drank beer with a young friend, Ralph Baggett. A single-barrel, twelve-gauge shotgun lay in the back seat. Harvard had placed his car within view of the Sandpar Bar and was apparently waiting for his ex-wife Ann Bovard to leave the tavern. According to the testimony of Baggett, when Ann Bovard drove off alone in her car, appellant followed. They had driven in tandem for about eight miles when they approached the residential area in which the woman lived. Harvard ordered Baggett into the rear seat and pulled the shotgun into the front. For some reason, Ann Bovard slowed to a stop on the right shoulder of the road. With his right hand, Harvard placed the barrel of the shotgun in the open window of the passenger's door; with his left hand he steered the automobile tightly along the left side of Ann Bovard's car so that the weapon aimed directly at her throat. He yelled, "Bitch," and fired into her neck. Ann Bovard died of massive damage to the trachea, esophagus, right artery, and left jugular vein.

Harvard was indicted for murder in the first degree. At trial, the jury found him guilty as charged. In the separate sentence advisory proceeding, the jury recommended death.

The trial court ordered a presentence investigation. The trial judge, upon consideration of the report, the evidence presented at the trial and sentencing proceedings, determined that there were sufficient aggravating circumstances which outweighed the mitigating factors to justify the recommended sentence. The trial judge sentenced William Lanay Harvard to death, entering the formal judgment as required by Section 921.141(3), Florida Statutes. The judgment stated the facts on which the death sentence is based as follows:

"1. The capital felony in this case was especially heinous and atrocious in that the defendant had previously been married to the victim and a divorce had occurred and thereafter the defendant harassed and terrorized the victim by threatening her with harm and death without any provocation on the part of the victim. The accused premeditated and plotted her death and included in his plans provision for an alibi for himself; the defendant stalked the victim and pulled up beside her on a public street pointing a twelve gauge shotgun and discharging it at close range directly into the neck of the victim.

"2. The defendant has previously been married to another woman and on one occasion had assaulted that wife with a firearm knocking her to the ground and discharging a pistol into her head while standing over her; that first wife did not die, the defendant was convicted of Aggravated Assault.

"3. The defendant testified in the separate sentencing proceeding, and his attitude, appearance and demeanor was that of a person cold, calculating and without remorse."

Appellant urges reversal of his conviction of first degree murder on three grounds. First, he contends that there was insufficient evidence to support a finding of premeditation; second, he contends that it was reversible error for the trial court to refuse to instruct the jury on aggravated assault as a lesser included offense; and third, he contends that it was reversible error for the state to make certain remarks during the closing arguments. We have searched appellant's arguments for merit, but have found none. The conviction is affirmed.

[1] When the sentence of death has been imposed, it is this Court's responsibility to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate. *State v. Dixon*, 283 So.2d 1 (Fla. 1973). We must also ensure that punishment for murder is evenly applied so that similar homicides will draw similar penalties.

[2] The aggravating circumstances include the following. Appellant has previously been convicted of a felony involving violence against a person. That conviction resulted from appellant's attempted murder of another former wife. In that prior inci-

dent, the appellant forcibly entered the woman's home and, in front of the children, threw her to the floor, placed his right foot on her back, and fired a twenty-two pistol into her head. Miraculously, she lived.

In the instant case, appellant again demonstrated his propensity toward calculated homicide in the killing of Ann Bovard. The murder was the final, deliberate stroke in appellant's campaign of terror against his ex-wife. He sought her out in the early morning hours, stalked her in the dark, and then in cold blood killed her with a shotgun at close range.

The record discloses no mitigating factors recognized by the statute. The total circumstances established the murder as a cold-blooded execution. The jury and the judge both found the aggravating circumstances sufficient to warrant death. We agree.

The conviction and sentence are affirmed.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and ROBERTS (Retired), JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion.

HATCHETT, J., concurs in part and dissents in part with an opinion.

BOYD, Justice, concurring in part and dissenting in part.

I concur in affirmance of the conviction of the appellant, but dissent to imposition of the death penalty.

The law requires that similar punishment be given for similar crimes. Just as four members of the jury who voted against an advisory sentence of death, I feel application of the death penalty is inappropriate after weighing the aggravating and mitigating circumstances as required under Section 921.141, Florida Statutes. I would direct the trial court to enter a sentence of life imprisonment without consideration of parole for a minimum of twenty-five years.

HATCHETT, Justice, concurring in part and dissenting in part.

I join in affirmance of the conviction but dissent as to the imposition of the death penalty.

ORDER

Pursuant to the dictates of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court directed the trial judge who imposed the death sentence in this case to advise the Court whether he imposed the death sentence in consideration of any information not known to appellant. His response states that he considered a confidential portion of the pre-sentence investigation report, and information furnished by the United States Marine Corps as to the defendant's military record, attached to the confidential evaluation, and that neither was furnished to counsel for the state or the defendant prior to sentencing.

Before the trial judge responded to our *Gardner* order, counsel for appellant filed a petition for rehearing, alleging various matters relating to appellant's conviction and sentence, and application for *Gardner* relief. The state has filed a response to the petition for rehearing.

[3] On consideration of appellant's petition and the trial court's response to our *Gardner* order, and pursuant to the decision of the United States Supreme Court in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), rehearing is denied but the sentence of death in this cause is vacated. The case is remanded to the trial court for resentencing, without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military history, as well as other matters properly considered by the trial court concerning appellant's sentence under Section 921.141, Florida Statutes (1977).

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

Case No. _____

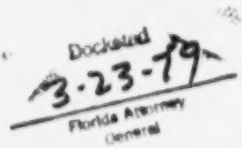
WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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Chief Assistant Public Defender

Counsel for Petitioner.

APP. 3

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

CASE NO.

WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on April 7, 1977.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 47,052 dated April 7, 1977 and the order denying rehearing November 2, 1978, are not yet reported in the national reporting system. The opinion of the court below is set out in Appendix A, and the Order is attached as Appendix B.

JURISDICTION

The judgment Petitioner seeks to have reviewed is an opinion of the Supreme Court of Florida filed April 7, 1977 and the denial of rehearing and order dated November 2, 1978. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

(1) Whether petitioner's conviction of first degree murder and his sentence of death deprive him of life without due

process of law, in violation of the Fourteenth Amendment, and violate the right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments, because the prosecutor referred in his closing argument to petitioner's failure to testify at trial.

(2) Whether the execution of petitioner's death sentence would deprive him of life without due process of law, in violation of the Fourteenth Amendment, and subject him to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments, because:

(a) the extreme penalty was assessed against petitioner and affirmed on appeal where the prosecution was allowed to introduce evidence of non-statutory aggravating circumstances and where it was based upon factors expressly invalidated in other capital cases, with the result that petitioner's death sentence was determined unfairly and unreliably; and/or

(b) the extreme penalty was assessed against petitioner and affirmed on appeal where the sentencing judge relied upon aggravating circumstances that were not proven beyond a reasonable doubt and improperly weighed the aggravating and mitigating factors as required by the Florida Statutes, with the result that petitioner's death sentence was arbitrary and capricious; and/or

(c) the extreme penalty was assessed against petitioner for an offense of which he was convicted upon merely circumstantial and/or wholly unreliable evidence; and/or

(d) the extreme penalty was assessed against petitioner under procedures announced by the Florida Supreme Court since this Court's decision in Proffitt v. Florida, which are inconsistent with the principles and predicates upon which this Court sustained the constitutionality of the Florida death penalty statute in Proffitt; and/or

(e) the limited hearing ordered by the Florida Supreme Court was insufficient to meet the dictates of Gardner

v. Florida, where the sentencing judge relied upon confidential information in imposing the death sentence upon petitioner; and/or

(f) the resentencing of petitioner that was ordered by the Florida Supreme Court because the sentencing judge had considered improper information in imposing the initial death sentence was not held before a different trial judge; and/or

(g) the Florida Supreme Court is arbitrarily applying the death sentence statute and this Court should reconsider its decision in Proffitt v. Florida.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Amendments V, VIII and XIV of the Constitution of the United States.

2. This case also involves Section 921.141, Florida Statutes(1973) which because of its length is set out in Appendix C.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari from a judgment of the Supreme Court of Florida which upheld petitioner's conviction and sentence of death. Petitioner, an indigent male, was sentenced to death on October 4, 1974 for the offense of first degree murder, by the Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida.

A. The Trial

The first degree murder charge involved the death of petitioner's ex-wife, Ann Bovard. Ms. Bovard's body was found in her car on the side of a road in early morning hours; she died from shotgun wounds to her neck(T*3-10,43,69,101). Various witnesses testified regarding arguments that petitioner and Ms. Bovard had had in the past(T 113,160,185-186, 192-193, 240-241,503) and as to threats petitioner allegedly had made(T 579-583).

*The symbol "T" will be used to refer to the transcript of the trial proceedings; and "R" will denote the record on appeal below, "TA" refers to the transcript of the Advisory Sentencing Proceedings, and "TS" denotes the sentencing proceedings.

Mr. Justice BRENNAN and Mr. Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentences in these cases.

1

441 U.S. 956, 60 L.Ed.2d 1060

Carl Ray SONGER, petitioner, v. FLORIDA. No. 78-6371.

Facts and opinion, 322 So.2d 481; 365 So.2d 696.

Petition for writ of certiorari to the Supreme Court of Florida.

May 14, 1979. Denied.

Mr. Justice BRENNAN and Mr. Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentences in these cases.

2

441 U.S. 956, 60 L.Ed.2d 1060

William Lanay HARVARD, petitioner, v. FLORIDA. No. 78-6429.

Facts and opinion, 375 So.2d 833.

May 14, 1979. Motion of petitioner to defer consideration of petition denied. Petition for writ of certiorari to the Supreme Court of Florida denied.

3

441 U.S. 941, 60 L.Ed.2d 1060

Frank Antonio PAVAO, petitioner, v. Clifford ANDERSON. No. 78-6543.

May 14, 1979. Motion for leave to file petition for writ of habeas corpus denied.

4

441 U.S. 956, 60 L.Ed.2d 1060

Carol C. JOHNSON, petitioner, v. Robert ABRAMS et al. No. 77-1444.

Former decision, 440 U.S. 945, 99 S.Ct. 1421.

Facts and opinion, *Johnson v. Lefkowitz*, 2 Cir., 566 F.2d 866.

May 14, 1979. Petition for rehearing denied.

5

441 U.S. 956, 60 L.Ed.2d 1060

Simon L. LEIS, Jr., et al., petitioners, v. Larry FLYNT et al. No. 77-1618.

Former decision, 439 U.S. 438, 99 S.Ct. 698.

APP 4

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT, IN
AND FOR BREVARD COUNTY, FLORIDA

CRIMINAL DIVISION
CASE NUMBER: 74-173-CF-A

STATE OF FLORIDA,

Plaintiff,

versus,

WILLIAM LAMAY HARVARD,

Defendant.

Baby Booth

STATE'S KIND OF HEARING

The transcript of the proceedings taken at the sentencing hearing held in the above-styled cause, in the Brevard County Courthouse, Titusville, Florida, on the ninth day of February, 1973, before the Honorable Robert B. McGregor, commencing at 2:12 o'clock p.m.

APPEARANCES:

CHRIS RAY, ESQ.,
Assistant State Attorney
State Attorney's Office
Brevard County Courthouse
Titusville, Florida 32780 — Appearing for Plaintiff

GEORGE McCARTHY, ESQ.,
Assistant Public Defender
121 S. Hibiscus Boulevard
Melbourne, Florida 32901 — Appearing for Defendant

WILLIAM LAMAY HARVARD, Defendant, present in person.

TERRI T. GRAY, C.S.R., Deputy Official Court Reporter

GERARD F. RYAN
Official Court Reporter
ROCKLEDGE, FLORIDA

APP 5

I N D E X

* * * * *

MR. McCARTHY: Yes, sir.

MR. RAY: I have no objection, Your Honor.

THE WITNESS: Thank you, Your Honor.

THE COURT: That you, Mr. Hess. Court would release you from your subpoena.

THE WITNESS: Thank you.

(Thereupon, the witness was excused.)

THE COURT: Call your next witness.

MR. McCARTHY: I call Mr. Harvard.

[illegible],

WILLIAM DANAY HARVARD,

the Defendant herein, called as a witness on his own behalf, being first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. McCARTHY:

Q Sir, would you please state your name?

A William D. Harvard.

THE COURT: Excuse me, Mr. McCarthy.

(Discussion held off the record.)

MR. McCARTHY: Judge, what we would like to do is have Mr. Harvard be able to refer to the copy of the pre-sentence investigation which the Court previously had provided to us, if I may.

APP 5

THE COURT: All right.

MR. McCARTHY: Mr. Harvard --

THE COURT: I referred earlier it was in evidence. I guess it's in the file. I provided both counsel copies of it and, of course, under the Supreme Court's instructions, I furnished it to them for their review prior to their remand.

Can we consider it as an exhibit for the purpose of this hearing or do you want to do that formally?

MR. McCARTHY: No, I think it's part of the court record, just ask the Court to take judicial notice of that portion of the record.

THE COURT: All right. Proceed, please.

Q (By Mr. McCarthy) Mr. Harvard, I'd like to refer you to page two of that presentence investigation. For the purpose of discussing and arguing, showing the Court the relevance, materiality or import of the portions of this presentence investigation, I'd like to refer you to, first of all, to what is labelled Defendant's Statement, about halfway down the page.

THE COURT: What page, please?

MR. McCARTHY: Sorry, page two, Judge.

THE COURT: Of the confidential -- or which portion? I gather it's --

MR. McCARTHY: Of the first portion, as to -- in other words, it's labeled Defendant's Statement.

Q (By Mr. McCarthy) Mr. Harvard, I'd like to refer you

to your statement concerning the fight which occurred between you and your wife; do you see that portion of it?

A Yes, sir.

Q I would ask you to explain to the Court the circumstances surrounding that physical encounter with your wife at that time in 1973.

THE COURT: This is at the cabinet shop now, is that--

MR. McCARTHY: Yes, sir.

THE COURT: Uh-huh.

THE WITNESS: Well, first of all, I'd like to state that there is many misquotations by Mr. Shelpman when he wrote down this as I told it to him, because the statement that's here is not --

THE COURT: Mr. Harvard, I gather that's what Mr. McCarthy is getting at, giving you an opportunity to straighten that out.

MR. McCARTHY: Yes, sir.

Q (By Mr. McCarthy) Mr. Harvard, perhaps, in your own words, you would like to go through the presentence investigation. I believe one of the areas you indicate you wish to discuss was on page two, regarding that incident in the cabinet shop; is that correct?

A Yes, sir.

Q All right. Perhaps you could refer specifically to some of these misstatements which you feel are present in the

presentence investigation, and also explain some of the incidents which are referred to in the presentence investigation.

A. Well, first of all, I asked her to come by the cabinet shop to discuss the divorce. He has a statement there that I made, had said that I knew she was seeing several men. That is untrue. I never said that she -- I knew about her seeing different men, I made a statement to her that because of what she had told me about her seeing different people, what I thought of her. I labelled her, and, as I -- I called her a tramp.

When I did that, it became a physical thing and she tried to kick me and I avoided that. I reached out to slap her. She grabbed my hand and put it in her mouth and almost took the end of my one finger and thumb. And I had to hit her two or three times to make her let go.

She did let go. She fell over a table. I think she injured her hand or her arm, and when she fell over the table, after she got up, I reached around her from behind and grabbed each wrist and led her out of the shop to try and detain her, just avoid a fight.

There was a gentleman from another shop that came around there and talked with us, and I let her go. She just left running, and later I left.

THE COURT: Mr. Harvard, about when did that occur?

THE WITNESS: It was on a Monday afternoon, I believe.

around five o'clock.

THE COURT: Day and month?

THE WITNESS: It was the last Monday of October. I think the twenty-ninth, possibly the thirtieth of October, '73.

THE COURT: And what was the -- at that time, you were husband and wife?

THE WITNESS: Yes, sir.

THE COURT: P.S.I. shows that the divorce was final on December tenth of '73; is that your recollection?

THE WITNESS: I believe, sir, it was December sixth.

THE COURT: All right.

THE WITNESS: I'm not positive, but I --

THE COURT: Then, this happened then the last of October?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q (By Mr. McCarthy) Mr. Harvard, referring to that particular incident, perhaps expanding it a bit, could you tell the Court whether, at any time during the divorce proceedings or from the time of the divorce in December until your wife's death in February of 1974, did you ever physically assault her and confront her physically? Did you ever do that during that period?

A I saw her one time and spoke to her face to face one

time. That was the only time. That was in Melbourne. That was just for a matter of maybe three minutes.

Q Sir, during this time from mid or late '73 until your wife's death in 1974, did you ever harass and terrorize her by threatening her with harm and death without any provocation on her part?

A Directly to her?

Q Yes.

A Not that I recall, no, sir.

Q Did you ever hit her, except in this one incident you've talked about during this period?

A No, sir.

Q Did you ever threaten her with death?

A I think indirectly by --

Q By a Christmas card?

A Yes, sir.

Q Could you explain to the Court the circumstances regarding that Christmas card?

MR. MCCARTHY: That's referred to in the presentence investigation, Judge, about midway through page three.

THE WITNESS: I don't remember exactly when -- well, I think it was early December, my children and myself were in the living room of my mother's place. And some newspapers -- mostly the cartoon area, kids were making up different comical type cards, using some of the cartoon

characters. And as I was cutting them out, I cut out some of those other words, and in the end, I pasted them to a letter.

My youngest daughter, I believe, was addressing envelopes to everyone that she knew or had addresses to, and I put the letter in the envelope, I'm quite sure. What happened with it after that, I'm not positive, until the State Attorney said that it was received by her.

Q (By Mr. McCarthy) At that time, were you contending to threaten to kill your wife?

A I may have made statements to that effect, but, I never made a comment to her as I was going to kill her, no, sir.

Q Did she ever threaten you during this period?

A Directly, no. I think --

Q How about indirectly?

A Well, I think the -- indirectly, she made comments to -- about filing different charges to people who knew both of us, and it got to me, and then I went to my attorney and asked him about it. That was Howard Warren.

Mr. Warren called the State Attorney's Office --

MR. RAY: I object, Your Honor. I object, this is calling for hearsay.

THE COURT: Were you present when he made the call, Mr. Harvard?

THE WITNESS: To my attorney?

THE COURT: Yes, sir.

THE WITNESS: Yes, sir, I was.

THE COURT: You may proceed.

THE WITNESS: He called the State Attorney's Office in Cocoa or Roc ledge and asked if there was a file on me. Whoever he was talking to said that they could not give that information on the phone, that if I were to appear personally or in person, that all questions would be answered.

And Mr. Warren told me this, told me where the place was. I went there on -- I talked to one of the secretaries in the office. I'm not sure which one.

Q (By Mr. Rotherty) All right. Mr. Harvard, if you will, is there any other portions of the presentence investigation that you'd like to bring to the Court's attention, to clarify that one of the Court misstatements or to amplify or explain any otherwise correct statements which are in there?

A Not at this moment, please.

Q Mr. Harvard, could I refer you towards the bottom of page three where there you are -- quote -- to do anything to -- quote -- get her out of his hair -- unquote.

A That happened due to an argument that took place in the coffee shop where my girlfriend was working. As I went in to breakfast, she told me that my ex-wife had came in the previous night and started an argument and got quite out of

hand, and there was something said and done. And when I heard about it -- well, quite frankly, it made me mad as hell.

Mr. Baggett was sitting there at the time, and I said to my girlfriend -- or not to anyone, really, but, as my girlfriend said that, I made a statement that I would give anything to get her out of my hair. At that time, Mr. Baggett asked me if I would be willing to give that Chrysler, indicating the car that I was letting him use, and I believe I told him I would gradually give that and more. And that was the end of it. I never thought any more about it.

Q Are you, at that time, referring -- saying get out of your hair, be essentially inviting Mr. Baggett or anyone else to murder your wife or your former wife?

A When I made the statement, I really wasn't speaking to anyone. I guess I was just letting off steam. But, sir, I was not offering cash or inviting anyone to take [illegible] of what I -- a statement I had made.

Sir, I'd like to refer you now to the beginning of the [illegible] portion of the presentence investigation -- it begins on page six -- and ask you if, regarding the -- reference, polygraph examination, if, specifically, if there are any misstatements contained within that confidential evaluation? See the portion there -- I think is underlined?

A I guess -- take some comment by evaluating the polygraph of Ralph Baggett, that it implied or conclusively shows

it was he who committed the act.

A. Uh-huh.

Q. I don't understand that, because Mr. Bennett himself testified in court under oath that he had failed to pass both -- or whatever -- two or three lie detector tests. He had failed on all of them. And it also implies that I would not take a polygraph test at a particular time; I was never ever asked about a polygraph test.

Now, sir, a little bit further down that paragraph, would you read the underlined portion regarding threatening letter and the admission that you attempted to shift responsibility for the threatening letter to your employer. Is, in fact, that a correct statement?

A. Where is it, sir? You're talking to me, I'm sorry. Where is it said. In court it was said that --

Q. Sir, I'm talking to you, Mr. McCarthy, I'm having trouble. Will you let me ask you?

A. Oh, I'm sorry. I'm sorry, Judge, that's still on page three, about two-thirds of the way down, the first Roman numeral one, affirmed.

THE COURT: Two-thirds of the way down?

THE WITNESS: Down that first paragraph, it says "affirmed."

THE COURT: Oh, I see it. All right.

Q. (By Mr. McCarthy) Mr. Harvard --

A. It was said in court that my eldest daughter had corrected this evaluation. I corrected that and I said no, it was not my eldest daughter, but my youngest daughter had corrected the envelope that I had put together the note itself. And then, Mr. Whitaker has implied that I am trying to place blame on my daughter for this having been done.

If whatever, I would take all blame away from any one of my children rather than try to place blame on them. I did not make any such statements in reference to that.

Now, would you please, the bottom of page six, the second-to-last portion of the evaluation, it goes into the Jacksonville -- when it -- do you see where we are here, last --

A. Yes, sir.

Q. Why, sir, were you arrested in Jacksonville on that charge?

A. Yes, sir, I was arrested in Louisiana, placed in jail in the Lafayette, Louisiana, on -- I think it was driving without a license or something to that effect. And the authorities contacted Florida, found that I was a -- a warrant for my arrest, and I waived all rights to extradition. And shortly thereafter, I was brought back to Jacksonville, Duval County.

Q. And going over on page seven, in that first paragraph, referring you to that, you'll see that there are a number of quotations as to what you allegedly said to the first Mrs.

[illegible] the new matter, in that --

THE COURT: Excuse me, just a minute, Mr. McCarthy. I'd [illegible] to identify the inaccuracies, if you please, of this confidential portion, and this last series of questions, I don't see what you're trying to show as being inconsistent or inaccurate, I should say.

MR. McCARTHY: Judge, regarding his arrest in Louisiana, you mean?

THE COURT: Yes, uh-huh.

MR. McCARTHY: Judge, there is no inconsistencies. I merely was trying to bring to the Court's attention the fact that he was arrested, he did waive extradition and voluntarily [illegible] return to Duval County.

THE COURT: That's what it says, right.

MR. McCARTHY: It doesn't state whether he -- it states he was arrested in Louisiana and that he was ultimately returned, transported to Duval County. I merely wish to remark upon that to --

THE COURT: All right.

MR. McCARTHY: All right.

Q. (By Mr. McCarthy) Over on page seven, sir, you'll see in the first paragraph many quotations which you allegedly made to Mrs. Jones and Mrs. Harvard at Mrs. Jewett's home in 1969. Do you see the portions that I'm referring to?

A. About three-fourths down the first paragraph, sir?

A Yes. Betty, I told you, took me back to court, I'm going to kill you, Betty.

Q Yes, sir.

Q Those quotations, do you recall making those statements to Mrs. Swett or to her sister-in-law -- I'm sorry, Mrs. Swett or Mrs. Harvard?

A No, sir, I do not recall it.

Q Did you go to their home that day with a gun intending to kill them?

A No, sir. A gun was there. I --

Q Whose gun was that?

A It belonged to Mrs. Swett.

Q Why did you go there that day?

A To see and get my children and just remove them from that situation that was prevailing there. And just came all confused and came very violent. The incident, or the shooting did happen, and I took the children to my mother, and I left with the intention of trying to get myself together and then try to come back and face whatever, and hope that through the court I could obtain some way to keep my children from these situations that they had been in prior to that.

Q Did you knock Mrs. Harvard down and put your foot on her back and shoot her in the back of the head with a pistol?

A No, sir, I was wrestling, trying to wrestle the youngest child away from her. And I don't know if she stepped

on something or what, but anyways, she turned loose of the child. She fell, and as she fell, the gun fired. The child screamed, and I believe there was powder burns on the child's leg. But, no, sir, I did not touch the woman after she had fallen. She was not before me ever -- was off of her foot.

It was not intend that she was shot, it just happened. I can't explain how it happened, it just happened.

Q Immediately prior to that incident there in Jacksonville, say like in the previous twelve hours, had you been drinking?

A Yes, sir.

Q Could you tell the Court what you had had to drink or how much, to give the Court an idea of the circumstances surrounding that incident?

A I was out with a friend of mine. We had been to several bars.

MR. RAY: Object as not being responsive, Your Honor. The question --

MR. McCARTHY: I said where and how much.

MR. RAY: -- how much.

MR. McCARTHY: I asked where he had been.

MR. RAY: "Where" is irrelevant. "How much" gets to the issue.

Q (By Mr. McCarthy) All right. How much?

A By own consumption, possibly two to three six-packs

of beer. It was several mixed drinks in the course of, perhaps, eight hours.

Q Now, after appearing before the court the first time, before the Jacksonville court, were you examined by a psychiatrist?

A Yes, sir. I don't know how many times. There was several times that I was in his office. I'm not sure what his name was.

Q Did you relate to him the fact you had been drinking?

A Yes, sir. And I don't know what his methods were in determining -- quite often, I was put to sleep.

Q Pardon me?

A Quite often I was put to sleep, so I have no idea of what the -- what went on.

Q By that psychiatrist?

A Yes, sir.

Q While he was examining you?

A Yes, sir. At the same time, I was directed to see a psychologist or analyst at the St. Luke's Hospital, but I have no idea what his name was or if he ever gave a report.

Q Mr. Harvard, referring -- turning your attention now to February of 1974, the evening that Mrs. Betty Harvard, your former wife at that time, died, during the previous, say, twelve hours prior to her --

A Pardon me, that was Miss Ann Bovart, sir.

Q All right. During the previous twelve hours, twelve hours immediately prior to that incident, had you been drinking?

A Yes, sir.

Q Could you tell us with whom and how much?

A I had been out with Mr. Baggett during the evening. I'd say possibly my drinking started at eight o'clock, and from eight o'clock until the time that that happened, there was, perhaps, three six-packs of beer drank, possibly more.

Q Was that a normal amount of consumption of alcohol for you?

A Perhaps a little more than what I normally drink in the evening.

Q Is there anything else, either regarding the pre-sentence investigation that you've been provided or anything else regarding this incident that you'd like to testify to, tell Judge McGregor at this time?

A I don't know, sir. Just some of Mr. Shelpman's analysis that --

THE COURT: What page, Mr. Harvard?

THE WITNESS: Page nine, sir. The bottom paragraph, perhaps the middle of the paragraph, he has stated there that I placed a pencil against -- a pistol against the head of the two women and pulled the trigger. That can't even imagine how he came to that statement, sir. He implies that I nurse a grudge. Sometimes, perhaps, I do,

but, to the extent that he's implying, I cannot believe that, no, sir.

Statements by Mr. Patterson. I don't understand how he's arrived at his statements while things happened right here in the county -- people involved that I was incarcerated with here at the county jail, much more atrocious than what came down with this particular thing here; but, I understand that's their professional opinion, and I won't argue with it, sir.

Q (By Mr. McCarthy) Mr. Harvard, were you, in the course of the investigation of this crime in 1974, ever given any -- or subject to any physical or scientific tests regarding the incident?

A By Mr. Patterson, yes, sir.

Q Could you explain what that was to the Court?

A Well, on Saturday morning, I was taking my girlfriend home, and when I got there, some men from the Sheriff's Department was there. I was taken down to the Sheriff's Department in Rockledge.

THE COURT: This is in February, now, after the shooting?

THE WITNESS: Yes, sir, the morning after. I was taken to the Sheriff's Department, and sometime during that next four or five hours, I was given a parrafin test. And when this was brought up in court, the one that was

given on Mr. Baggett was present and showed as negative, when mine was asked about parrafin test on myself, it was conveniently lost.

Q (By Mr. McCarthy) Do you know what the result of that parrafin test was by you?

A No, sir, it was never made public or never given to the defense.

Q Lost by whom?

A Mr. Patterson was, at that time, in charge of the investigation. That's all I can say.

Q Do you have anything else you'd like to tell the court at this time? Did you shoot your wife in 1974?

A No, sir.

Q Who did?

A Well, just as I made my statement at the trial, or the sentencing phase, I stated then that Mr. Baggett shot my ex-wife, and I still maintain that Mr. Baggett shot my ex-wife.

I'm not sure as to why, except that he was under the impression that I had offered him money to do so, which, I did not.

MR. McCARTHY: Judge, I don't have any other questions

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. RAY:

Q When you took the stand in the trial, you denied

The Court is not ready to make a decision at this point. These matters will be taken under advisement. Sentencing will be scheduled for an occasion in the future at which time the Court will announce its decision.

(Thereupon, the proceedings were concluded.)

* * * * * * * * * * * * *

C E R T I F I C A T E

STATE OF FLORIDA)
) SS:
COUNTY OF BREVARD)

I, TERRI T. CRAY, C.S.R., Deputy Official Court Reporter in and for the State of Florida at Large, do hereby certify that I was authorized to and did report in stenotype the foregoing proceedings, consisting of pages numbered 1 through 87, inclusive; that said pages contain a true and correct transcript of the testimony taken at the hearing in the aforementioned styled cause on the ninth day of February, 1979.

WITNESS MY HAND And Official Seal of Office, in the City of Rockledge, County of Brevard, State of Florida, this 22nd day of February, 1979.

Terri T. Cray

TERRI T. CRAY, C.S.R.
Deputy Official Court Reporter
My commission expires: 4/25/80.

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT, IN
AND FOR BREVARD COUNTY, FLORIDA

CRIMINAL DIVISION
CASE NUMBER: 74-173-CF-A

STATE OF FLORIDA,

Plaintiff,

versus,

WILLIAM LAMAY HARVARD,

Defendant.

Bailey Book

TRANSCRIPT OF HEARING

The transcript of the proceedings taken at the sentencing hearing held in the above-styled cause, in the Brevard County Courthouse, Titusville, Florida, on the ninth day of February, 1973, before the Honorable Robert B. McGregor, commencing at 2:12 o'clock p.m.

APPEARANCES:

TERRI RAY, ESQ.,
Assistant State Attorney
State Attorney's Office
Brevard County Courthouse
Titusville, Florida 32780 Appearing for Plaintiff

GEORGE McCARTHY, ESQ.,
Assistant Public Defender
121 S. Hibiscus Boulevard
Melbourne, Florida 32901 Appearing for Defendant

WILLIAM LAMAY HARVARD, Defendant, present in person.

TERRI T. GRAY, C.S.R., Deputy Official Court Reporter

GERARD F. RYAN
Official Court Reporter
ROCKLEDGE, FLORIDA

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I N D E X

that right?

THE WITNESS: I believe so, yes, sir. And, sir, I didn't tell the judge about this, this was given to the judge, I think, by way of statement from my daughter.

THE COURT: Your -- she was six years old at the time?

THE WITNESS: Yes, sir. I believe that Mr. Hess' wife is the one that took the statement from my daughter.

THE COURT: And she told the judge about it; is that it?

THE WITNESS: I think the statement was presented.

THE COURT: A written statement?

THE WITNESS: I believe so, yes, sir.

THE COURT: In Jacksonville, Mr. Harvard, during the shooting there, you were at the home of your then sister-in-law waiting for the ladies to come home, I gather?

THE WITNESS: Yes, sir.

THE COURT: And Mrs. Swett had a pistol in the house, or something, and you had found that, and then there was a confrontation; is that correct?

THE WITNESS: Yes, sir.

THE COURT: And the sister-in-law spoke up, or something, and angered you or lost your temper or something, you shot her in the face; is that it?

THE WITNESS: Yes, sir, But, I -- I'm quite sure

that there was some point of where she was either trying to get the gun from me or I was trying to get the gun from her, and during that is when she was shot in the face. It was not like I was standing ten feet from her.

THE COURT: How far were you from her?

THE WITNESS: As close as I am to this young lady.

THE COURT: Indicating the Court Reporter sitting next to you here?

THE WITNESS: Yes, sir.

THE COURT: Then she ran out of the house?

THE WITNESS: Yes, sir.

THE COURT: And then your wife, at that time, she started running and you followed her; is that it?

THE WITNESS: She went out the back door. I think I went out the same door with her. I caught her and was trying to get the youngest girl -- baby, away from her, and as I pulled the baby loose, she fell and jerking the baby -- I can't say I did not pull the trigger myself, I say, in jerking the baby away from her, my hands gripped the pistol and it went off. I know my child's leg was burned where the gun -- as it went off.

And as she was falling, I believe her heard was down, the bullet hit her here and went back, not as such she indicated that I was standing on her or holding her down and shooting her.

THE COURT: What happened to the child thereafter?

THE WITNESS: I left. You see, I had driven there in one of the vehicles that belonged to the company I worked for. When I left, I didn't want to take their truck, so, I put the children in the car that belonged to my wife's sister, the boy and the girl, baby girl. I went from there to the schoolhouse where my oldest daughter was going, and I removed her from school. Then I drove down and left the children with my mother. I went from --

THE COURT: In Cocoa at that time?

THE WITNESS: Yes, sir.

THE COURT: Does counsel wish to examine further in light of the Court's inquiry?

MR. McCARTHY: No, sir.

MR. RAY: No, Your Honor.

THE COURT: That you, Mr. Harvard. If you would, have a seat, please.

(Thereupon, the Defendant retakes his seat at the Counsel's table.)

MR. McCARTHY: Judge, if I may at this time, I would propose to introduce into evidence what's been marked Defendant's Exhibit "A", that being the certified as true and correct copy of the records which appeared in the case of the State of Florida versus William Harvard in Case Number 69-1741, from Duval County, Jacksonville,

specifically referring to the letter from William Ingram, M.D., to Mr. Hess, regarding Mr. Harvard's mental condition. That was referred to briefly in the presentence investigation. I merely present to the Court the total letter, which was used to arrive at that statement in the presentence investigation. Also, Your Honor --

MR. RAY: No objection.

THE COURT: Let it be received then as Defense Exhibit Number Two.

(Thereupon, Defendant's Exhibit Number Two was received in evidence.)

MR. McCARTHY: Judge, I would also ask the Court to review the transcript of the testimony in 1974 before the advisory jury, specifically with reference to the testimony of Mrs. Betty Ann Phillips on page thirteen of that transcript.

THE COURT: I don't know if I have it or not.

MR. McCARTHY: Judge, if I may, this is a copy. If you do not have it there -- copy which was used by the Public Defender's Office by West Palm Beach in appeal, which has been sent back to us.

Judge, we would have no further evidence to present to the Court at this time.

THE COURT: Other than this inconsistency on page thirteen, or what you believe is an inconsistency between

The Court is not ready to make a decision at this point. These matters will be taken under advisement. Sentencing will be scheduled for an occasion in the future at which time the Court will announce its decision.

(Thereupon, the proceedings were concluded.)

* * * * * * * * * * * *

C E R T I F I C A T E

STATE OF FLORIDA)
) SS:
COUNTY OF BREVARD)

I, TERRI T. CRAY, C.S.R., Deputy Official Court Reporter in and for the State of Florida at Large, do hereby certify that I was authorized to and did report in stenotype the foregoing proceedings, consisting of pages numbered 1 through 87, inclusive; and that said pages contain a true and correct transcript of the testimony taken at the hearing in the aforementioned styled cause on the ninth day of February, 1979.

WITNESS MY HAND and Official Seal of Office, in the City of Rockledge, County of Brevard, State of Florida, this 14th day of February, 1979.

TERRI T. CRAY, C.S.R.
Deputy Official Court Reporter
My commission expires: 4/25/80.

IN THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA.

CASE NUMBER 74-173-CF-A-01

STATE OF FLORIDA, SUPREME COURT CASE No. 47,052

Plaintiff,

vs.

WILLIAM LANAY HARVARD,

Defendant.

JUDGMENT ON RESENTENCING

On February 25, 1974, the Defendant was indicted by the Grand Jury for the First Degree Murder of Ann Bovard during the early morning hours of February 16, 1974. His trial before a jury commenced June 17, 1974, and on June 21, 1974, the jury returned a verdict of guilty as charged. On June 24, 1974, the trial jury considered evidence presented by the State and Defense relating to the issue of punishment and returned an advisory sentence of death. The Court ordered a pre-sentence investigation and subsequently also ordered a psychiatric examination of the defendant. After completion of the pre-sentence investigation and the psychiatric examination, the defendant appeared for sentencing on October 4, 1974, and after the Court heard the arguments of counsel and after the defendant exercised his right of allocution, the Court imposed the sentence of death. The court found the defendant to be indigent and appointed the Public Defender to represent him during his appeal to the Supreme Court. On April 7, 1977, the Supreme Court of Florida issued its opinion affirming the conviction and sentence. On June 17, 1977, this Court received from the Supreme Court direction to advise the Supreme Court whether any information was used by this Court in sentencing the defendant which was not disclosed to the defendant. On July 15, 1977, this Court responded that the confidential portion of the pre-sentence investigation report had not been disclosed. The defendant had, in the interim, filed his petition for a rehearing in respect to the opinion of the Supreme Court affirming the conviction and sentence. On November 2, 1978, the Supreme Court issued its order denying a rehearing but vacating the sentence of death and remanded the case to this Court for resentencing without the

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necessity of convening an advisory jury, but with directions to provide counsel for the State and the Defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality and import of the confidential information contained in the pre-sentence investigation. On December 5, 1978, the Supreme Court issued its Mandate thereon and this Court on December 12, 1978, pursuant to said Mandate vacated its sentence and directed the Sheriff of Brevard County to return the Defendant from the Department of Corrections for purpose of resentencing. On December 18, 1978, the Court re-examined the Defendant as to his indigency and appointed the Public Defender to represent him for the resentencing. Counsel for the State and Defendant were provided with copies of the confidential portion of the pre-sentence investigation including the Defendant's military record of court martial conviction while he was in the United States Marine Corps. Counsel for the Defendant filed a Motion for the Convening of an Advisory Jury, Motion for Substitution of Judge, and Motion for Order Directing the State of Florida "to Provide the Defendant the Precise Grounds on which the State Seeks the Death Penalty in this Case." Upon hearing arguments of counsel all such motions were denied and the case was set for sentencing on January 24, 1979, and, at the request of the Defendant for more time to prepare, was reset for February 9, 1979. On February 9, 1979 this Court conducted a resentence hearing. The counsel for the Defendant attempted to expand the hearing beyond the scope set out in the Supreme Court's order of November 2, 1978, and while this Court denied such expansion, it did permit the Defendant to profer certain testimony which the record will disclose. In addition, the Defendant was afforded the opportunity of exercising his right of allocution. Upon the conclusion of the hearing this Court took the resentencing under advisement and now hereby issues its resentencing judgment.

In respect to the opportunity afforded the Defendant to explain, contradict, and argue regarding the relevance, materiality and import of the confidential information contained in the pre-sentence investigation,

it appears to this Court that, while there was a summary of the 1969 shootings of a former wife and a former sister-in-law contained in the confidential portion of the pre-sentence investigation, the Defendant's main thrust was to impeach the testimony of the former wife and former sister-in-law as given in the bifurcated sentencing phase of his trial and not the summarized information as set out in the pre-sentence investigation. Such impeachment should have been done at the time of trial and it therefore appears that this was a wrongful attempt to belatedly impeach evidence presented by the State to the advisory jury. The Supreme Court's Remand was not for this purpose. As to the testimony contained in transcript of the proceedings of the probable cause hearing before the Justice of the Peace in Jacksonville in 1969, (more than five years earlier than the testimony of the former wife and the former sister-in-law during the bifurcated sentencing phase), this Court finds it to be substantially (and remarkably so for the passage of time involved) consistent and uncontradicting. As to the military records, the Defendant took no issue with their correctness. As to all other matters considered by the Court during the resentencing hearing, the Court finds that they were either beyond the scope of the resentencing Mandate of the Supreme Court or that they did not contradict the information provided this Court in the confidential portion of the pre-sentence investigation. As a consequence, this Court believes and so finds that the sentence, as originally imposed, was appropriate. On review of the entire case and pursuant to §921.141, F.S., this Court has weighed the aggravating and mitigating circumstances and finds that sufficient aggravating circumstances exist to justify and authorize a death sentence and that the mitigating circumstances are insufficient to outweigh such aggravating circumstances and that a sentence of death should be imposed in this case. This Court makes the following findings of fact upon which the sentence of death is based:

FACT CATEGORIES OF AGGRAVATING CIRCUMSTANCES AS ESTABLISHED AND LIMITED BY §921.141(5), F.S.

(a) §921.141(5)(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted?

FINDING:

The defendant was not under a sentence of imprisonment when he committed the murder of which he has been convicted.

(b) §921.141(5)(b) Whether the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person?

FINDING:

The defendant was charged in case #69-1741-B in Duval County with the charge of assault upon Mary Jane Sweat with the premeditated design to kill by unlawfully assaulting her with a deadly weapon, contrary to §784.06, F.S. and on December 5, 1969, the defendant entered a plea of guilty to the lesser included offense of aggravated assault. The record reflects that Mary Jane Sweat was a sister to the defendant's first former wife, Betty Ann Harvard. The circumstances of this assault reveal that the defendant discharged a pistol into Mrs. Sweat's face in the living room of her home, which he had entered without authority to await the return of his first former wife. Mrs. Sweat fled her home and the defendant fired his pistol at her again but missed. The defendant then fled the scene taking Mrs. Sweat's 1964 Chevrolet automobile and nine days later was arrested in Lafayette, Louisiana. The defendant waived extradition and was subsequently returned to the Duval County Jail. The breaking and entering charge and the auto larceny charge arising out of this episode were nol prosed pursuant to a plea bargain in respect to the aggravated assault charge. The defendant on January 12, 1970, appeared before the Honorable A. Lloyd Layton in the Duval County Criminal Court and was adjudicated guilty and sentenced to be confined in the County Jail for the term of one year but that after having served three months of said term he was placed on probation for a period of one year.

(c) §921.141(5)(c) Whether the defendant knowingly created a great risk of death to many persons?

FINDING:

While the use of a shotgun in the residential streets of Merritt Island, Florida at 2:00 a.m., (the approximate time of the murder of Ann Bovard, the second former wife of the defendant), could have jeopardized others, there is no evidence that anyone else was actually placed in risk of death.

(d) §921.141(5)(d) Whether the murder was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing any of the offenses specified in §921.141(5)(d)?

FINDING:

The defendant was not engaged in any of the crimes so enumerated at the time he murdered his second former wife.

(e) §921.141(5)(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody?

FINDING:

There is no evidence that the killing of Ann Bovard was done for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) §921.141(5)(f) Whether the capital felony of which the defendant was convicted was committed for pecuniary gain?

FINDING:

There is no evidence that the defendant benefited in a pecuniary way from the death of his former wife, from whom he was divorced on December 10, 1973, without apparently any obligation to pay alimony.

(g) §921.141(5)(g) Whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the law?

FINDING:

There is no evidence that the murder of Ann Bovard was done to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the law.

(h) §921.141(5)(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel?

FINDING:

While the defendant and Ann Bovard had been divorced approximately two months, they had been separated for several months, and during the separation the defendant had engaged in a series of harassing actions. In addition, the defendant enclosed in a Christmas card he sent to Ann Bovard in December, 1973, a note saying, "You will never see Christmas." In January, 1974, after the divorce, the defendant told a co-worker that he would "do anything to get her out of his hair". On the night of the killing, February 16, 1974, the defendant waited outside of his second former wife's place of employment, and when she left he followed her for approximately ten miles to the entrance of the subdivision in which Ann Bovard lived, where he pulled up close beside her apparently momentarily stopped vehicle and with a 12-gauge shotgun shot her in the neck with a shot shell loaded with pellets. The blast tore away a portion of her neck, and she apparently died almost instantly. Such activities (the waiting, the following, and the shooting from a car window) clearly demonstrates that this premeditated homicide was a calculated and cold blooded execution. Such killing was done without any provocation on the part of the victim.

(i) §921.141(5)(i) (This section of the Statute was adopted after the date of this homicide and therefore does not apply.)

FACT CATEGORIES OF MITIGATING CIRCUMSTANCES AS PROVIDED BY §921.141(6), F.S.

(a) §921.141(6)(a) Whether the defendant has no significant history of prior criminal activity?

FINDING:

As reflected above, the defendant had been previously convicted of aggravated assault involving the use of a firearm where he shot his victim in the face; this occurred a little less than five years previously. During the episode involving this assault upon his first former wife's sister, he also shot his first former wife. While he was charged with the shooting of his first former wife, he was not convicted of it; such charge was nol prosed as part of the plea bargain surrounding his plea of guilty to the charge of aggravated assault upon his former sister-in-law, and, therefore, the Court cannot cite it as an aggravating circumstance; however, Court believes that it is entitled to consider the entire episode of prior criminal misconduct when considering this category of mitigation; and in that respect, the Court notes that the shooting of his first former wife was done after he laid in wait for his victim, that it was done with a pistol shot to the head of the victim at close range immediately after shooting the former sister-in-law in the face and after the former wife, while trying to escape with her children from the sister's house, either fell or was pushed to the ground by the defendant who stood over her and shot her in the back of the head.

(b) §921.141(6)(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance?

FINDING:

There is no evidence that the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder. The evidence at the trial showed a well planned and thought out pattern of conduct both before and during the murder. Furthermore the defendant made provision for an alibi after the murder.

(c) §921.141(6)(c) Whether the victim was a participant in the defendant's conduct or consented to the acts?

FINDING:

The victim at no time and in no way consented to or participated in the conduct of the defendant.

(d) §921.141(6)(d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor?

FINDING:

The defendant was not a mere accomplice, but was the active and aggressive perpetrator of the murder.

(e) §921.141(6)(e) Whether the defendant acted under extreme duress or under the substantial domination of another person?

FINDING:

While there was a younger man present at the time of the murder, there is no evidence that the defendant was under his domination nor was there any evidence of the defendant being under duress of any kind.

(f) §921.141(6)(f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired?

FINDING:

The defendant fully appreciated the criminality of his conduct as evidenced by his efforts to effect an alibi, as further evidenced by his throwing the murder weapon and box of shotgun shells in the river after the murder, and as further evidenced by the fact that he had been within the preceding five years held to answer for almost the identical misconduct and was, therefore, well aware of the standard of conduct expected of a citizen in such circumstances.

(g) §921.141(6)(g) The age of the defendant at the time of the crime.

FINDING:

The defendant was born October 2, 1937, and was, therefore, 36 years of age at the time of the homicide.

IT IS THEREFORE the finding of the Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating circumstances as specified in §921.141, F.S. and insufficient mitigating circumstances therein that a sentence of death is justified.

JUDGMENT was rendered in open Court and entered on the minutes of the Court that said defendant was adjudged guilty and convicted of Murder In The First Degree, (Section 782.04(1)(a), F.S.); and the Court informed the defendant of the accusation against him and of the judgment and of his right of allocution and he showed no cause authorized by law why sentence should not be pronounced and imposed upon him, he was

SENTENCED to be put to death in the manner and means provided by law (See Section 922.10, F.S.). The Court informed the defendant of his right to appeal from this judgment and sentence.

DIRECTIONS TO THE CLERK, SHERIFF AND COURT REPORTER:

The Clerk of this Court shall file and record this judgment and sentence and shall prepare four certified copies of this record of

conviction and sentence of death and the Sheriff of Brevard County shall send one such copy of this record to the Governor of the State of Florida (Section 922.09, F.S.). The defendant is hereby remanded to the custody of the Sheriff of Brevard County, Florida who is directed to deliver the defendant and the second certified copy of this conviction and sentence to the custody of the Department of Corrections to await the issuance by the Governor of a warrant commanding the execution of this sentence of death to be done (Section 922.111, F.S.).

The Clerk of the Court shall forthwith furnish the third certified copy of this judgment to the Court Reporter taking said proceedings in the above cause since the initial imposition of sentence in this cause and to certify the correctness of the notes and the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this Court.

This judgment of conviction and sentence of death being subject to automatic review (Section 921.141(4), F.S.), the Clerk of this Court is hereby directed to make up a complete record of all portions of the record since the initial sentencing and send two copies thereof and, after certification by the sentencing Court, the Clerk shall transmit the portions above designated to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon counsel for the defendant on appeal. After the Clerk has filed a transcript of record on appeal with the Appellate Court, counsel for the defendant on appeal shall file his brief within the time provided in F.A.P. Rule 6.11b. The Clerk of this Court shall forthwith furnish the fourth copy of this judgment to the defendant's counsel on appeal.

The defendant having been adjudged insolvent for purposes of appeal, Brevard County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in the Eighteenth Judicial Circuit of Florida this 16th day of May, 1980.

CIRCUIT JUDGE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 14th day of May, 1980, to Dean Moxley, Esquire, Office of the State Attorney, Brevard County Courthouse, Titusville, Florida 32780 and to George E. McCarthy, Esquire, Office of the Public Defender, 350 North Washington Avenue, Titusville, Florida 32780.

Secretary to Circuit Judge

IN THE SUPREME COURT OF FLORIDA

WILLIAM LANAY HARVARD,	)	
	)	
Appellant,	)	CASE NO. 47,052
	)	
v.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	ATTORNEY GENERALS OFFICE

APPELLANT'S SUPPLEMENTAL BRIEF

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
319 Clematis Street
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Assistant Public Defender

Counsel for Appellant.

APP. 8

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

STATUTES CITED

Florida Statutes (1973)

PRELIMINARY STATEMENT

This brief is filed simultaneously with a Motion to File Supplemental Brief.

Appellant will rely upon the Preliminary Statement, Statement of the Case and Statement of the Facts as set out in his initial brief and his reply brief herein.

POINT INVOLVED

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE SENTENCE OF DEATH PURSUANT TO FLORIDA STATUTES, SECTION 921.141(1973)?

ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY PURSUANT TO FLORIDA STATUTES, SECTION 921.141

The essence of Appellant's contention herein is that the aggravating circumstance of "heinous, atrocious, and cruel" was unsupported by the evidence, consistent with this Court's interpretation of that phrase. Further, the sole remaining aggravating factor of a previous conviction for a felony does not alone justify the imposition of the death penalty. Also, there were mitigating circumstances which were not considered by the trial court.

The trial court made the following findings regarding the imposition of the death sentence:

> 1. The capital felony in this case was especially heinous and atrocious in that the defendant had previously been married to the victim and a divorce had occurred and thereafter the defendant harassed and terrorized the victim by threatening her with harm and death without any provocation on the part of the victim. The accused premeditated and plotted her death and included in his plans provision for an alibi for himself; the defendant stalked the victim and pulled up beside her on a public street pointing a twelve gauge shotgun and discharging it at close range directly

into the neck of the victim.

2. The defendant had previously been married to another woman and on one occasion had assaulted that wife with a firearm knocking her to the ground and discharging a pistol into her head while standing over her; that first wife did not die, the defendant was convicted of Aggravated Assault.

3. The defendant testified in the separate sentencing proceeding, and his attitude, appearance and demeanor was that of a person cold, calculating and without remorse.(R 9)

The first factor set out above deals with Fla. Stat. 921.141(5)(h)(1973) which provides an aggravating circumstance if the capital felony "was especially heinous, atrocious, or cruel." It is settled now that this phrase comprehends a killing out of the norm. It is a killing which is extremely wicked or vile with a high degree of suffering and one unnecessarily tortorous. State v. Dixon, 283 So. 2d 1(Fla. 1973); Sullivan v. State, 303 So. 2d 632(Fla. 1974); Alford v. State, 307 So. 2d 433(Fla. 1975); Gardner v. State, 313 So. 2d 675(Fla. 1975). Moreover, each aggravating circumstance must be proven beyond a reasonable doubt. Alford v. State, supra.

Examples of cases in which this court upheld a finding of "especially heinous, atrocious, or cruel"

includes the "execution-type slaying" in Sullivan v. State, supra, where the victim's hands were tied and he was beaten with a tire iron and shot with a shotgun which was reloaded and emptied again. Also, in Alford v. State, supra, a 13 year-old girl was raped and her body was left on a trash heap with wounds in her back, head, arms, and chest. Gardner v. State, supra involved a victim who had over one-hundred bruises, hair pulled from her scalp, contusions, and wounds in the pubic area caused by a broom handle and by stomping. Alvord v. State, ___So. 2d ___(Fla. 1975), Case No. 45,542, Opinion filed September 17, 1975 concerned the strangulation death and possible rape of three victims during a burglary.

Contrary to these cases, decision have held evidence to be insufficient to support the finding of this aggravating circumstance. In one case the victim was bound so that if she tried to free herself she would choke, she was gagged and beaten and found in a semi-conscious state after a burglary and never regained consciousness. Swan v. State, ___So. 2d ___(Fla. 1975), Case No. 45,452, Opinion filed September 3, 1975.

Tedder v. State, ___So. 2d ___(Fla. 1975), Case No. 46,267, Opinion filed November 19, 1975 involved a jury

recommendation of life imprisonment and the trial court's imposition of the penalty of death. Therein, the defendant who had recently separated from his wife, without advance warning, stepped from behind a tree and began firing at his wife, child, and mother-in-law. The wife made it inside of the house with the child, but she heard more shots and the scream of her mother. The defendant then broke in and took the wife and child at gunpoint and would not allow his wife to assist or examine her mother who was lying on the floor. This Court reaffirmed that the Legislature intended something "especially" heinous, atrocious or cruel. Allowing the victim to languish without assistance or the ability to obtain assistance did not, in that case, amount to the aggravating circumstance justifying the death penalty.

Most recently, in Halliwell v. State, ___So. 2d ___(Fla. 1975), Case No. 45,885, Opinion filed December 3, 1975, it was held that the defendant who killed his victim in a violent rage as the result of a love triangle and who dismembered the body after death should not be sentenced to death. The defendant had beaten the victim's skull with lethal blows from a breaker bar. The Court recognized:

> "we see nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court. "Slip Opinion at 6.

Likewise, Appellant submits that the facts presented in the case at bar do not indicate the shockingly wicked killing contemplated by the legislative and by this Court as justifying the imposition of the death sentence. The trial court found that theoffense was especially heinous, atrocious and cruel because Appellant had "harrassed and terrorized" the victim. However, it is submitted that an examination of the evidence indicates no more than strong ill-feeling between two ex-spouses. It is not the "terror" implied by the trial court which would warrant the penalty of death or which would set the killing aside from the norm. Appellant submits that a fair reading of evidence reveals the relevant prior actions of "harrassment" by Appellant as follows:

> (1) After separating, his wife moved in with Maureen Meagher (T 154). They received several phone calls from Appellant in which he stated: "I will be right over, baby" and then he panted (T 162).
>
> (2) Appellant accused his ex-wife of being a lesbian(T 167) but she ignored it(T 169).
>
> (3) Appellant called the telephone company and had Ms. Meagher's phone

disconnected(T 116, 162).

(4) Appellant had an argument and a fight at the cabinet shop with his ex-wife on October 30, 1973 over her harrassment of his children. She received a bruise on her arm and a cut on her neck(T 119-120, 159, 186-188). Appellant's fingers were biten(T 119).

(5) Appellant attempted to give his ex-wife some marijuana and then have her arrested but she would not take it(TA 152-154, 156-161).

(6) On one occasion Appellant threw some firecrackers in the lawn of a house where his ex-wife was staying(T 241).

(7) Appellant sent an allegedly threatening letter(T 580-583)

Accordingly, Appellant submits that while the above enumerated facts may not be justified, they do not manifest the "terror" which would support the death sentence. Additionally, regarding threats of death alluded to by the trial court, there was no showing that any of these "threats" were ever communicated to the victim. The fact that Appellant may have told someone he would like to be rid of his ex-wife, would not be a apposite to the "harrassment or terror" inflicted upon the victim. Thus, the threats would not be relevant to the sentencing.

Also, the "stalking" referred to by the trial

court was unsupported by the evidence. There was no showing that Appellant knew he was going to the beach to drink with Mr. Baggett on that evening. The testimony showed that the meeting was more by chance, in fact, he wanted to work that night but Mr. Baggett was too upset (T 364-368). Upon seeing his ex-wife, the evidence indicates that he followed her and pulled next to her and the shot was fired. It is submitted that this is more analogous to an "outburst of anger" or a "sudden rage" situation. See Halliwell v. State, supra at 6, cf. Alvord v. State, supra at 10. This is also a case where the death occurred as a result of a single shot and was not of itself torturous or shockingly vile. See Alvord v. State, supra at 10.

Therefore, Appellant submits that the evidence does not support the finding of "especially heinous, atrocious, or cruel" beyond a reasonable doubt. This circumstance can not be utilized to justify the penalty of death.

The sole remaining aggravating circumstance found by the court which falls within the statutory framework is Appellant's 1969 conviction for aggravated assault. Fla. Stat. 921.141(5)(b)(1973). Appellant

submits that this factor alone does not justify the death sentence. This offense arose out of a dispute with his previous wife over custody of the children and over their welfare(TA 53-54, 66-69). The weapon in the case was a pistol which was in his wife's sister's home when the dispute arose(TA 68). Thus, it was not an unprovoked attack on his ex-wife and her sister but rather was a domestic dispute growing from his sincere concern for his children.

In regard to mitigating circumstances pursuant to Fla. Stat. 921.141(6)(1973), Appellant submits that the lack of a significant prior history of criminal activity should have been considered. While evidence of one previous offense was offered, there was no showing of other criminal convictions. As this Court has recognized, this mitigating circumstance involves a weighing process, such that the less activity the more weight should be given to it. See State v. Dixon, supra at 9. Also, there was testimony that Mr. Baggett and Appellant had been drinking heavily on the night of the offense (T 365, TA 78). It is therefore possible that Appellant may have been "substantially impaired" in his actions and this factor should be considered. Fla. Stat. 921.141(6)(f)(1973).

One additional element should be considered by this Court. In three cases this Court has contemplated whether the evidence was "overwhelming" such that an "innocent" man would not be executed. First in Taylor v. State, 294 So. 2d 648(Fla. 1974) the Court, despite the jury's verdict, recognized "at least the possibility" that the defendant had not fired the fatal shot. Id at 652. This element was considered by this Court in reversing the death sentence. Moreover, in Alford v. State, supra, the Court expressly recognized:

> "Additionally, the evidence of defendant's guilt in these crimes was particularly strong, discounting the possibility of an 'innocent' man being sentenced to die." 307 So. 2d at 445.

Thus, the possibility of innocence was again weighed by the Court. This possibility was also of some concern to the Court in Halliwell v. State, supra.

Appellant submits that the"possibility" likewise should be weighed in the case at bar. Even if the evidence is held sufficient to support the verdict, in view of the above-cited cases, the sufficiency of the evidence should be evaluated in reviewing the penalty of death. As fully argued in Point I of Appellants' initial and reply briefs,there was an intervening factor in the firing of

the fatal shot. Ralph Baggett placed his hand on the gun at the moment of firing, and initially he thought that he may have caused the discharge of the weapon and that perhaps Appellant may have only been trying to scare his ex-wife(T 386-387, 460). Regarding his pulling the gun and the possibility that he caused the killing, the strongest statement he made at trial was that "it would have been <u>almost</u> impossible"(T 387). However, Appellant requests this Court to consider the <u>possibility</u> that Mr. Baggett caused the discharge of the weapon and thus the possibility that Appellant was"innocent" of Murder in the First Degree, when it weighs the totality of the circumstances in judging whether the death sentence should be imposed.

Therefore, the essence of Appellant's position herein, is that the offense is not one set aside from the norm and not one which the legislature intended to warrant the "unique" punishment of death.

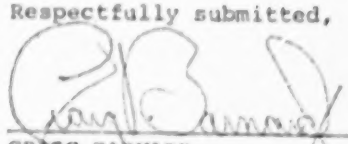
CONCLUSION

For the foregoing reasons Appellant respectfully requests this Honorable Court to set aside the sentence of death imposed by the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to HONORABLE MICHAEL M. CORIN, Assistant Attorney General, The Capitol, Tallahassee, Florida 32304, by mail, this 29 day of December, 1975.

Respectfully submitted,



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IN THE SUPREME COURT OF FLORIDA

WILLIAM LANAY HARVARD,	)	
Appellant,	)	
v.	)	Case No. 47,052
STATE OF FLORIDA,	)	
Appellee.	)	

12-30-75

MOTION TO FILE SUPPLEMENTAL BRIEF

Appellant, WILLIAM LANAY HARVARD, moves this Honorable Court to allow filing of the attached Supplemental Brief in the above-styled cause. As grounds Appellant states:

1. The issue discussed in the Supplemental Brief is:

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY PURSUANT TO FLORIDA STATUTES, SECTION 921.141?

2. This issue was not raised in Appellant's initial brief herein and the undersigned counsel did not represent Appellant at the time the initial brief was prepared. Thus, the undersigned did not have an opportunity to present this crucial issue to the Court for its consideration.

3. The issue is critical and must be examined by this Court pursuant to Florida Appellate Rules 6.16 (b). The Supplemental Brief, limited to the propriety of the death sentence, can only aid the Court in fulfilling its obligation to review the aggravating and mitigating circumstances of Fla. Stat. 921.141.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to HONORABLE MICHAEL M. CORIN, Assistant Attorney General, The Capitol, Tallahassee, Florida 32304, by mail, this 29th day of December, 1975.

Respectfully submitted,

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